

STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Petition of Chelsea Solar LLC, pursuant to	)	
30 V.S.A. § 248, for a certificate of public	)	
good authorizing the installation and	)	PUC Case No. 17-5024
operation of the “Willow Road Project,” a	)	
2.0 MW solar electric generation facility	)	
on Willow Road in Bennington, Vermont	)	

**REQUEST FOR ORAL ARGUMENT AND
COMMENT OF MOUNT ANTHONY COUNTRY CLUB AND
APPLE HILL HOMEOWNERS ASSOCIATION
ON HEARING OFFICER PROPOSAL FOR DECISION**

Mount Anthony Country Club (MACC) and Apple Hill Homeowners Association (AHHA) request the Public Utility Commission hold oral argument in this case.

MACC and AHHA submit these comments on the Hearing Officer’s Proposal for Decision.

MACC and AHHA recommend based on the record of evidence in this case that the Public Utility Commission must deny issuance of a Certificate of Public Good to Chelsea Solar LLC.

1. Clarifying That This Project Has Had Many Different Names

For clarification, MACC and AHHA recount the history of the name of this Project.

Petitioner was awarded a Standard Offer contract in 2013 under the name “Bennington Solar” for a 2 MW project on the same area of the same parcel of land as this petition. Petitioner petitioned for a CPG for a 2 MW project in 2014 under the name “Chelsea Solar” on the same area of the same parcel of land as this petition. Petitioner petitioned for a CPG for a 2 MW project in 2017 under the name “Chelsea Solar Project” on the same area of the same parcel of land. The Hearing Officer (HO) now refers to the 2 MW project on the same area of the same parcel of land as the original Bennington Solar, Chelsea Solar, and Chelsea Solar Project as the

“Willow Road Project.”

MACC and AHHA refer to the project as “Chelsea Solar 2” (CS2), consistent with the name we used in our Brief.

2. The Project Will Unduly Interfere With the Orderly Development of the Region

The Public Service Board denied a CPG for Chelsea Solar on February 16, 2016 in Docket No. 8302, finding that the Project would unduly interfere with the orderly development of the region. Specifically the PSB stated as follows (italics supplied to ensure easy identification of the PSB decision language):

We do not adopt the Hearing Officer’s conclusion (proposed finding 30) that the Project will not unduly interfere with the orderly development of the region because we find that the Project is inconsistent with the Bennington Town Plan and with the recommendations of municipal representatives contained in that plan.²² While the specific language in the Bennington Town Plan was not reviewed as an issue under the orderly development criterion in this Docket until after the Hearing Officer had issued his PFD, we nonetheless find it appropriate to discuss it here because the Town Plan language at issue is also applicable to the Section 248(b)(1) criterion, which states:

. . . With respect to an in-state facility, will not unduly interfere with the orderly development of the region with due consideration having been given to the recommendations of the municipal and regional planning commissions, the recommendations of the municipal legislative bodies, and the land conservation measures contained in the plan of any affected municipality.

For the reasons discussed below, the language of the Bennington Town Plan causes us to reject proposed finding 30. We also reject proposed finding 32 because it does not accurately reflect the Bennington Town Plan’s provisions regarding development in Bennington’s Rural Conservation Districts.²³

. . .

The Town Plan addresses all of the land area of the Town. It recognizes

the need for continued growth and promotes further concentrated development that may occur in the Urban Growth Area. The Town Plan also includes rural areas designated for less development. Specifically, the Town Plan states that “[a]lthough development will occur outside [the Urban Growth Area], it will be much less concentrated and shall not include new commercial uses because such uses are incompatible with the rural character of the area.”²⁶

Chelsea argues that “development is not precluded” at the Project site, relying on the prefiled testimony of Chelsea’s aesthetics consultant whose conclusion is reiterated at proposed finding 32.²⁷ A more complete and accurate characterization of the Rural Conservation Districts is that only limited residential development is permitted in the Rural Conservation Districts. While limited residential development is permitted, commercial development is prohibited with certain rural exceptions.²⁸

Bennington’s Rural Conservation Districts are located in valley areas outside the Urban Growth Area and have retained their rural and open-space character. The purpose of the Rural Conservation Districts is to preserve traditional rural and agricultural uses while accommodating low-density residential development. For example, the Town Plan states that “agriculture, forestry, very low density single-family residential development, and certain limited uses that are suitable in rural areas are permitted.”²⁹

The interchange at the junction of US Route 7 and VT Route 279 serves as the southwestern corner of the Rural Conservation District in which the Project is proposed. The area immediately to the west of Route 7 is in an Industrial District. The area immediately to the south of the interchange is part of a Mixed Residential District. The areas east of the Project site are in Rural Residential, Rural Conservation, and Agricultural Districts. The interchange highway complex thus serves as a boundary between developed urban and industrial areas in the western, central, and southern portions of Bennington, and minimally developed rural and agricultural areas in northeastern Bennington.³⁰

The Town Plan makes the following design standard applicable to any new development in the Rural Conservation Districts:

Specific design standards shall apply to new development in the Rural Conservation Districts in recognition of the existence of a concentration of agricultural and forest lands and to protect the extraordinary scenic resources such lands and uses provide. Any use in the Rural Conservation District, including single family dwellings, shall require approval under those regulatory guidelines. Development in this area cannot be sited in prominently visible locations on hillsides or ridgelines, shall utilize earth tone colors and non-reflective materials on exterior surfaces of all structures, and must minimize clearing of natural vegetation.³¹

This land conservation measure is made specifically applicable to the Project site by the Town of Bennington's Land Use Plan.³² While Chelsea has taken steps to limit the visibility of the Project on the hillside where it is proposed to be located, the clearing of 10.6 acres of existing vegetation runs directly afoul of this provision in the Town Plan and its vision for orderly future development.

...

For the reasons discussed above, we also disagree with the Hearing Officer's conclusion on orderly development. Rather, we find, based on our review of the Town Plan, that the Project will unduly interfere with the orderly development of the region because the Town Plan articulates specific land conservation measures applicable to the Project site that would be violated if the Project were to be constructed.

See Public Service Board Docket No. 8302 (Chelsea Solar LLC), Final Order dated February 16, 2016 at pages 50-55.

We believe that the PSB was correct in its interpretation of the Bennington Town Plan in its February 16, 2016 Decision and Order denying the first Chelsea project a CPG. We believe that any decision that disregards the legal holding that the Bennington Town Plan contains a clear written community standard for the RCON district, is erroneous whether that decision is made in this 2nd Chelsea Solar case or the Apple Hill Solar case, which is currently on appeal to

the Vermont Supreme Court on that very issue. The fact of the matter is that Petitioner abandoned its appeal of the PSB Decision in Docket No. 8302 and agreed to a voluntary dismissal; therefore, the PUC does not get to inexplicably disregard its prior holding that the Town of Bennington Town Plan contains a clear written community standard when this case involves the exact same parties, the exact same issues, and Petitioners were provided a full and fair opportunity to litigate the issues and in fact, they did! When the Petitioner chose a litigation strategy to dismiss their pending appeal to the Supreme Court and start over with a different project and a brand new application, they are subject to the preclusive effect of *res judicata* which will not permit the Petitioner to get a “do-over” or to have a second bite at the apple just because their litigation strategy backfired.

One can examine the issues that were raised on appeal to the Vermont Supreme Court by reviewing Petitioner’s Docketing Statement, which is attached for reference as is the Order of Dismissal Order of the Supreme Court and the PSB’s decision in Docket No. 8302. The Docketing Statement identifies the exact issue with regard to the PSB’s conclusion on aesthetics: that the Town Plan provides a clear, written community standards prohibiting the solar project in the RCON district, including the argument that PSB issued CPG’s to other facilities in the RCON zone, including before and after it denied Chelsea’s CPA. Petitioner/Appellant’s Statement of Issues to be Raised on Appeal states, *inter alia*:

- 3) Did the Board improperly apply the *Quechee* test by holding that the Town Plan provides a clear, written community standard prohibiting the solar project in the Bennington Rural Conservation ("RCON") zone, particularly when (i) the Town Plan contains no specific requirements that are legally enforceable, (ii) the actual zoning bylaws (which the Board intentionally ignored) permit the solar project in the RCON zone, (iii) the Town Plan and regional plans contain other goals supporting the project, (iv) the Board has in fact issued certificates of-public good to other facilities in the RCON zone, including before and after it denied Chelsea's

CPG?

Vermont Supreme Court Docket No. 2017-195. Appellant's Docketing Statement dated June 6, 2017, Exhibit B.

Thus, Petitioners had a full and fair opportunity to litigate the issues and in fact did raise the very issue within the aesthetics context and could have done so for the Orderly Development criterion. Consequently, Petitioner's voluntary dismissal of its appeal of Docket No. 8302, created a final judgment in the case which is now closed. There was no remand of the matter by the Supreme Court which returned jurisdiction of the case to the PSB. Instead, the Petitioner voluntarily dismissed the appeal, which is the legal equivalent to not having taken an appeal at all.

After dismissing the appeal to the Supreme Court, the Petitioner then filed a new application for a different 2 MW project on the same portion of the same parcel of land. Once the new Project Petition was deemed complete, the PUC assigned a new Docket number to the new case. Thus, the legal holding in Docket No. 8302, that the Town Plan contains a clear written community standard with regard to the RCON District, has been established and that Final Decision by the PSB, whether it was never appealed or appealed and then withdrawn or dismissed, is now *res judicata* and Petitioner is barred from re-litigating the legal holdings in Docket No. 8302 despite the PUC and HO's erroneous holding in this case and in the companion Apple Hill Solar case (to which the legal holding in Docket No. 8302 will bar re-litigation through the Doctrine of Collateral Estoppel, which is a topic of the pending appeal to the Supreme Court). Because all of the elements for *res judicata* exist between Chelsea 1 and Chelsea 2 (i.e. identity of parties, identity of issues, full and fair opportunity to litigate), the Petitioner cannot now reargue whether the Town Plan contains a clear written community standard for the RCON district. And the PUC IS bound by its prior legal holding.

We are hopeful that the PUC does not compound its prior erroneous inexplicable footnote holding in the Apple Hill Solar decision that indicates that the PUC believes that it is NOT bound by its prior decision and will carefully analyze the law so that the Supreme Court does not have to overturn and correct two cases. The law of the Town Plan has been established – that there is a clear written community standard. Now the job of the PUC is to apply that law to the facts of the new project to determine whether the new project violates the clear written community standard contained in the Town Plan’s RCON district.

Turning to the application of the law to the facts in this matter, it is noteworthy that Intervenor’s are now having to make arguments on this statutory criterion for the fourth time, because each of these cases -- Chelsea Solar and Apple Hill Solar’s original plans, Apple Hill Solar and Chelsea Solar 2 revised plans -- have had evidentiary hearings and briefing.

§ 248 (b) says “Before the Public Utility Commission issues a certificate of public good as required under subsection (a) of this section, it shall find that the purchase, investment, or construction:

(1) With respect to an in-state facility, will not unduly interfere with the orderly development of the region with due consideration having been given to the recommendations of the municipal and regional planning commissions, the recommendations of the municipal legislative bodies, and the land conservation measures contained in the plan of any affected municipality.”

Unfortunately, the role of the municipal and regional planning commissions and the municipal legislative bodies in this case have been tainted by the overly aggressive and litigious actions of the petitioner, which not only threatened to sue the Town, but acted on its threats by bringing suit in Superior Court against all of the above named bodies. The case was removed to Federal Court, after which petitioner withdrew the lawsuit. Petitioner then brought suit against

the municipal planning commissions and legislative bodies in the Environmental Division of Superior Court. While the Court correctly dismissed the case due to lack of jurisdiction, it did not allow the Town to recoup its legal expenses. The threat of endless litigation and expense in legal venues, including the PUC, resulted in the Town's withdrawal from this case the week of the evidentiary hearing. The Town accepted a payment that does not make the Town whole with regard to recovering its expenses. The settlement is evidence that the town withdrew under duress.

Regardless of the duress that caused the Town to withdraw from this case, the HO attempts to rely on the changing position of the Town in his proposal for decision recommending issuing a CPG for this project. The HO neglects to reference even once the important and credible testimony in the record by Bennington Planning Director Daniel Monks (INT-CROSS 1) that describes the Town's reasons for opposing the project because it does not comply with the Town Plan. The HO prefers to deflect from the Town Plan's clear intention to protect and conserve certain natural areas of town by focusing more on the changing position of the Town, while neglecting to acknowledge the undue financial duress inflicted on the Town by petitioner that caused the Town to remove itself from this case.

The HO erroneously cites to the approval of Apple Hill Solar on p. 19, claiming "the Town determined that the Apple Hill Solar Project would not unduly interfere with orderly development despite the potential cumulative impact of its location and the Town did not oppose this Project despite that cumulative impact." when the truth is that the Town's reasons for not opposing Apple Hill Solar were based on costs associated with participating in both projects. The Town *did not* determine that the Apple Hill Solar Project would not unduly interfere with the orderly development as a reason to not oppose the projects. This twisting of the truth is

prevalent in the HO's interpretation of this case and the associated Apple Hill Solar case.

Because petitioner successfully neutralized and tainted the positions of the municipal and regional planning commissions and legislative bodies through overly aggressive and expensive litigation, any statements from the Town that resulted from the litigation should be given no weight.

The PUC is left to consider the land conservation measures in the plan of Bennington to determine whether the project will unduly interfere with the orderly development of the region. Testimony of Bennington's Planning Director was submitted prior to petitioner's interference by litigation, and therefore should be considered. That testimony specifically addresses the land conservation measures in the plan, but the HO did not consider it in his PfD.

The record in this case, CS2, is the most developed regarding the effect of this project on the orderly development of the region. Bennington's Town Plan, as described in detail by Town Planning Director Daniel Monks which the HO chose to ignore entirely, contains clear written standards which this project does not comply with:

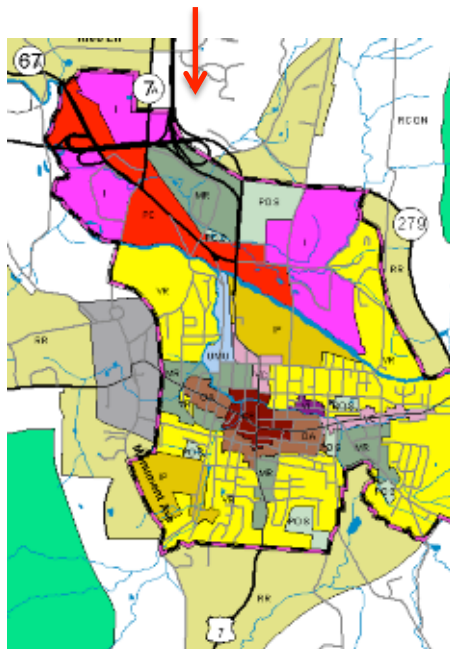
“ Specific design standards shall apply to new development in the Rural Conservation Districts in recognition of the existence of a concentration of agricultural and forest lands and **to protect the extraordinary scenic resources such lands and uses provide.**

Development in this area cannot be sited **in prominently visible locations on hillsides** or ridgelines, shall utilize earth tone colors and non-reflective materials on exterior surfaces of all structures, and **must minimize clearing of natural vegetation.** ...”
[emphasis added]

With the PUC's approval of the contiguous Apple Hill Solar project which also does not comply with the Town Plan, the HO proposes that the PUC find that clearing nearly 20 acres of forest from an important, prominently visible scenic hillside complies with the requirement to “minimize clearing of natural vegetation.”

Petitioner has attempted to confuse the facts about this project's specific site by bringing in other solar projects that have been approved by the PUC in the RCON district. As the PUC witnessed on the site visit for the two projects last year, the other solar projects mentioned by petitioner are not visible at all from the important vantage points. They do not contain the combination of elements specific to this site: prominently visible + hillside + gateway area + minimize clearing of natural vegetation. The other sites might contain one or two of those elements, but are in no way comparable to the importance of this specific site to the orderly development of the region.

The Town of Bennington has made important decisions regarding its land use districts. Industrial areas are outside the core area where the Town envisions protecting scenic natural beauty. This project sits precisely in the area the Town has identified through its planning documents as inappropriate for industrial or commercial development. Bennington's Future Land Use Map [Exhibit MACC-ML-5], which the HO did not reference, shows the industrial areas in purple, commercial areas in red, and Rural Conservation District in white.



PfD's Finding #93 says "The Project would expand the extent of development across Route 7 into the Rural Conservation District. Kane pf. at 4-5; exhs. PSD-DR-2 at 8-9, CS-BW-45 at 4, CS-MK-2 at 10-11, and CS-MB-2 at 14-15 and Figure 2." Both Petitioner's and Department of Public Service's witnesses agree that the proposed industrial solar project would change the project site from Rural Conservation to Commercial/Industrial. MACC and AHHA find it incredible that the HO has chosen to ignore this very important fact and does not see it as a reason to deny development in order to comply with the Town Plan's vision of how Bennington should develop.

The RCON standards are very specific regarding what is an acceptable visual impact in the RCON district. The image on the left is acceptable, and is how Libby Harris's home is viewed from nearly all current vantage points. The image on the right is not acceptable, and shows precisely what must occur if this project and its partner Apple Hill Solar are constructed.



Not only would the projects (together or separately) create an opening in the forest that is precisely what the Town plan says it does not want to see, it would also clear the trees that are currently screening Libby Harris's home from view from most vantage points.

Finding #93 also says "The existing visual character of the site is dominated by the extensive highway infrastructure and nearby commercial and industrial development." That may be true if viewed from the Welcome Center or Route 7 or the highway interchange, but is not an

accurate description of the visual character of the site as shown in the record. The HO's review of evidence again omits critically important information that would result in a different finding, if he had looked at it.

Specifically, the PfD contains no reference to Exhibit MACC-ML-1, which presents half a dozen professional photographer's images that include the project site. We would normally simply refer to the Exhibit, but since nobody, especially the HO, seems to have read our filings, we will show some of the images again here:





The evidence in the record that the HO did not address shows that the project site has economic value to the Town of Bennington. This specific site as documented by professional photographers is not dominated by the extensive highway infrastructure and nearby commercial industrial development, but on the contrary, is very important to the Town for maintaining its natural resources and scenic beauty, as required by the standards in the Rural Conservation District.

The Town of Bennington's careful long-range planning could not be clearer: Allow industrial and commercial development confined to certain areas, while protecting important natural resources and scenic beauty in specific areas, one of which is where this large industrial solar array is proposed. Nowhere in the Town Plan documents does the Town envision allowing an expansion of the commercial or industrial roads across Route 7 to include the prominent

Apple Hill hillside, which the record shows is exactly what will happen if this project is built.

The HO failed to address the evidence on Orderly Development. The HO's recommendation on this criterion should, therefore, be given no weight by the Commission. The PUC should deny a CPG because the project would unduly interfere with orderly development of the region, as the PSB correctly found in its decision denying Chelsea Solar 1 in 2016.

3. The Project Will Have an Undue Adverse Effect on the Aesthetics and Historic Sites

The prior legal holding in Docket No. 8302 is also *res judicata* with regard to the issue of aesthetics because that was also decided by the Final Decision of the PSB with regard to the Town Plan containing a clear written community standard which is one of the three prongs of the Quechee analysis; thus, the Petitioner is barred from re-litigating this issue by the Doctrine of *res judicata*. (See attached Docketing Statement, Exhibit B, Issue 3 and the language quoted *supra*) The PSB's Final Decision in Docket No. 8302 (which had been appealed to the Vermont Supreme Court but then voluntarily dismissed by the Petitioner) stated as follows (again italics added to help identify the PSB Final Decision language):

. . . Ms. Harris argues that the aesthetic impact of the Project would be undue because it would violate clear, written community standards found in the Town Plan and thus fails the first prong of the second part of the Quechee test, which states:

The next step in the two-part test, once a conclusion as to the adverse effect of the project has been reached, is to determine whether the adverse effect of the project is "undue." The adverse effect is considered undue when a positive finding is reached regarding any one of the following factors:

- 1. Does the project violate a clear, written community standard intended to preserve the aesthetics or scenic beauty of the area?³⁹*

Ms. Harris argues that limitations on development in the Rural Conservation District constitute a clear, written community standard that would be violated by the Project. We agree with Ms. Harris and therefore do not accept the Hearing Officer's recommendation on this point.

In order for a provision to be considered a clear, written community standard, it must be "intended to preserve the aesthetics or scenic beauty of the area" where the proposed project would be located and must apply to specific resources in the proposed project area.⁴⁰ A clear, written community standard must be more than simply "general in nature" and do more than seek "to promote good stewardship of scenic resources without identifying specific actionable standards."⁴¹

The Town Plan language for the Rural Conservation District creates four specific requirements: (1) only limited residential development is permitted,⁴² (2) no development may be sited in prominently visible locations on hillsides or ridgelines,⁴³ (3) any development must utilize earth-tone colors and non-reflective materials on exterior surfaces of all structures,⁴⁴ and (4) any development must minimize the clearing of natural vegetation.⁴⁵

The Project violates three⁴⁶ of these four specific requirements in the Town Plan for development in the Rural Conservation District. First, Chelsea Solar is not proposing a limited residential development. Second, while Chelsea has developed an extensive visual screening plan, the Project would remain visible on a hillside above the Vermont Welcome Center. And third, the Project calls for clear-cutting 10.6 acres of a densely forested and undeveloped 27-acre parcel. These proposed actions would violate this clear, written community standard in the Town Plan, and we therefore conclude that the Project fails the Quechee test.

Chelsea argues that the Town Plan language is merely a "recommendation."⁴⁷ We disagree.

The Town Plan states that “agriculture, forestry, very low density single-family residential development, and certain limited uses that are suitable in rural areas are permitted.”⁴⁸ The Town Plan also makes the following design standard applicable to any new development in Rural Conservation Districts:

Specific design standards shall apply to new development in the Rural Conservation Districts in recognition of the existence of a concentration of agricultural and forest lands and to protect the extraordinary scenic resources such lands and uses provide. Any use in the Rural Conservation District, including single family dwellings, shall require approval under those regulatory guidelines. Development in this area cannot be sited in prominently visible locations on hillsides or ridgelines, shall utilize earth tone colors and non-reflective materials on exterior surfaces of all structures, and must minimize clearing of natural vegetation.⁴⁹ (emphasis added)

In this case, we find that the Town Plan language is specific in nature, is specifically applicable to the Project site, and seeks to conserve scenic resources by identifying specific actionable requirements and thus constitutes a clear, written community standard.⁵⁰

Chelsea further characterizes the Town Plan provisions describing the Rural Conservation District as “vague, amorphous” and “nebulous.”⁵¹ Chelsea maintains that these provisions are actually “zoning bylaws.”⁵² Chelsea argues that it would be “frivolous” to rely on the standards in the Town Plan for the Rural Conservation District because they “compel a specified outcome contrary to the intent of the Legislature in providing an exemption from zoning by-laws for Projects reviewed under Section 248, as well as to established Vermont law.”⁵³ We find this case distinguishable from our decision in Cold River, where de facto zoning bylaws were at issue.

In Cold River we found that Town of Rutland’s solar siting standards (the “Standards”), newly crafted in support of the Rutland Town Plan, were a de facto zoning bylaw and could not be relied upon as a clear, written community standard “for purposes of aesthetics review under § 248 because the Standards fail to identify this particular parcel as a scenic

resource worthy of protection.”⁵⁴ Rather than being established as a site-specific set-aside for the purposes of aesthetics and conservation, as is the case here, the Standards in Cold River were a town-wide setback rule for solar projects. The Board concluded that:

In the instant case, recognizing the setback requirements in the Standards as a clear, written community standard would be tantamount to taking what is in substance a zoning bylaw, and by simply calling it something else, facilitating the circumvention of Section 248’s zoning bylaw exemption. In turn, this would amount to effectively condoning a mechanism that would frustrate the legislated policy behind exempting Section 248 projects from local zoning in the first instance.⁵⁵

The factual circumstances are different here. The standards for the Rural Conservation District were established to conserve the rural character of a particular area of Bennington, not to create town-wide setbacks for solar projects. The Rural Conservation District provisions in the Bennington Town Plan are not de facto zoning bylaws as argued by Chelsea.⁵⁶ Further, the Rural Conservation District language identifies specific actionable requirements.⁵⁷ The Town Plan’s language limiting development in the Rural Conservation District represents a clear, written community standard appropriately considered in a review under Section 248(b)(5) and the first prong of the second part of the Quechee test.

We appreciate the efforts of Chelsea and the Department to propose an unprecedented and costly vegetative screening plan to mitigate the visual impacts of the Project. However, our conclusion that the Project would violate a clear, written community standard intended to preserve the aesthetics or scenic beauty of the Project site and its surrounding area concludes our analysis of the aesthetic impacts of the Project using the Quechee test.⁵⁸

See Public Service Board Docket No. 8302 (Chelsea Solar LLC), Final Order dated February 16, 2016 at pages 55-60.

Intervenors re-allege and repeat their same argument offered above in the Orderly

Development section, as if fully set forth below with regard to the preclusive effect of the prior Final Decision in Docket No. 8302 on the issue of aesthetics, pursuant to the doctrine of *res judicata*, i.e. that the Town Plan contains a clear written community standard such that Petitioners cannot satisfy the first prong of the Quechee analysis; therefore, we will not repeat those arguments again in full.

In addition to the above and foregoing, this Project introduces numerous aesthetic impacts that cannot be mitigated or have not been addressed by petitioner. It is undisputed in the record that clear-cutting nearly 10 acres of forest, now in conjunction with a similar clearing for the contiguous CPG-permitted Apple Hill Solar project, will increase wind and noise for residents of the Apple Hill development uphill. Petitioner's experts attempt to minimize those impacts, and AHHA does not have a gold mine sufficient to pay for all the experts that would have been necessary to refute the glowing claims of petitioner's experts, but the record does show that despite saying the increase in wind impacts and noise will be minimal, the petitioner's experts do admit that those impacts will increase.

Nowhere in the record does Petitioner address noise from construction, which is projected to occur for many months. AHHA opposes any Sunday work as anticipated by Petitioner which the HO says should be allowed. The HO attempts to minimize the impacts of construction, which include chainsaws, perhaps cutter/feller/bunchers, and chippers all of which are known to produce high noise levels of which the record is totally deficient.

Petitioner has failed to present any visual simulations whatsoever of important views as documented by professional photographers (see p. 9). Petitioner has also failed to present a single simulation of the numerous vantage points from the Mount Anthony Country Club.



This is not an insignificant omission. If, as claimed, the distance of approximately one mile mitigates the view from the Country Club, petitioner's two experts could easily have shown what the two projects together would look like when constructed. Since the record is devoid of any simulations that document the project as built, a CPG should not be issued for this project as the Petitioner has not met its burden of proof. The HO neglects to mention this important deficiency.

The aesthetic impacts from Bennington's Battle Monument are also minimized by Petitioner and the HO. Vermont's Department of Historic Preservation inexplicably entered a letter of "no impact" even before the pre-hearing conference for this project had been held, and long before evidence by Intervenors was submitted, which says more about the cursory examination of VDHP than the actual impacts the project would have on the historic resource.

The narrative being used to support minimal impact from the Bennington Battle Monument is that the project site is only visible through a narrow window. That concept ignores the fact that people not only see the project site hillside directly out the narrow window, but it is common practice for visitors to hold their cameras out the openings and take photos such as this

one that is in the evidentiary record, though nowhere mentioned by the HO in the PfD. This photo did not appear by magic, it is what people experience and further supports the reasons for the standards in the Town Plan's RCON intended to preserve this site's natural beauty.



CS2 will unduly adversely impact the aesthetics of the extremely important historic Bennington Battle Monument. Separately or in conjunction with Apple Hill Solar, the two projects' cumulative effect will be a major change in the aesthetics of the region that are unduly adverse. The PUC should deny a CPG for this project because it will result in an unduly adverse aesthetic impact.

4. Other issues: Wildlife, Air Pollution, Water Pollution, Cumulative Impact of What Is Functionally One 4 MW Solar Array

Given how little weight our intervention in this case has been given, we will simply recount what is common sense based on living in the area that we believe should be considered by the PUC in deciding to deny a CPG for this project: cutting the forest will remove important air pollution mitigation resources, will displace wildlife, create possible public safety issues, and has the potential to change the flows of PFOA-contaminated groundwater. These are extremely

important issues for the residents of the Apple Hill Homeowners' Association, which is already experiencing increased traffic noise since the highway interchange was built, and for whom the contamination of our water supplies by a toxic chemical is having a negative impact. Why this project is more important than the quality of our lives and our health is something we will never understand. There are many, many appropriate locations for large scale solar arrays in the town of Bennington. This site is not at all appropriate, yet nothing we say seems to matter.

If the PUC agrees with the HO and approves this project in immediate proximity to Apple Hill Solar, it will be doing a grave disservice to the region and the State of Vermont. We believe that Public Service Board member John Burke got it right in his dissent of May 22, 2013 in which he cited an October 16, 2009 Order in Docket 7533 which clarified the rules for Standard Offer projects:

I would have disqualified the Bennington Solar Project and the Apple Hill Solar Project proposals since both proposals are located on the same parcel of land and have similar interconnection points.

...any collection of generation components that meets the definition of a plant, and exceeds the 2.2 MW cap, shall be removed from the queue, although the generation components may reapply for the standard offer if the scope of the project is adjusted to comply with the 2.2 MW cap.

Without any evidence in the record to show the aesthetic impact of both projects, if CS2 is approved, the PUC is effectively rubber stamping one 4 MW solar array on a prominent hillside in Bennington's Rural Conservation District, in violation of the Town Plan's clear written community standard for the specific site and in exceedence of the 2.2 MW cap for Standard Offer projects. Both projects propose to be constructed and operated via Willow Road, both projects require the same one mile power line extension, and any claims that they have separate points of interconnection or are using separate roads are simply gimmicks to game the rules.

5. Role of Hearing Officer and Procedural Issues

Participation in this case was a disturbing experience for members of the public. Two intervenors withdrew after the HO failed to respond to a timely request to quash depositions that Petitioner scheduled in Burlington in violation of the rules for depositions. The HO issued an order on the morning of the day of the scheduled depositions, at a time when the two intervenors would have had to already be driving to Burlington to get to the depositions in time. One long-time intervenor withdrew due to health reasons that resulted from the stress of intervening in the two cases on the same site in four different proceedings beginning in 2014, and the PUC's determination that they would not quash the deposition of that intervenor.

However, nothing that occurred prior to the evidentiary hearing prepared us for what happened at the evidentiary hearing.

AHHA's *pro se* representative describes her experience:

My experience as a citizen Intervenor at the PUC during the hearing for Chelsea Solar was stressful and mostly negative. In addition to my being ignorant about and unaccustomed to the procedures and expectations, it was preceded by a very negative phone call experience during a Status Conference about the project. That phone call was opened by the Hearing Officer verbally chastising us as Intervenor for not being lawyers (yes — we were painfully aware of that!) and not behaving appropriately in handling the blizzard of constant emails by the developers. He singled us out for criticism, in my opinion, entirely unfairly, and that set a tone of antagonism against us and our pro-bono attorney which was then carried forward during the in-person hearing later, in September.

During the hearing there were a number of times when the Hearing Officer coached the witnesses for the developers. As an inexperienced participant it seemed very noticeable to me that when those witnesses were being evasive, he turned to them in a friendly manner and helped them answer, or interpreted what he thought they really meant or were trying to say. I was shocked. He never helped our witnesses.

When our pro bono attorney attempted to preserve an off the record discussion for the record within ten minutes of going on the record on the first day of the hearing, the Hearing Officer screamed at her and threatened to throw her out of the room if she continued speaking.¹ That reaction on his part was so negative and shocking to me as an average person. Later in the day, the Hearing Officer again threatened our attorney to “take it outside” after she attempted to get a hostile witness for the developer to answer the questions she was asking. Instead of properly addressing the witness and advising him to “answer the question you are asked,” the Hearing Officer yelled at our attorney again. Our attorney’s tone was quiet and respectful but correctly forceful in seeking information from the witness, but the Hearing Officer’s tone was so utterly disrespectful and entirely disproportionate. It made feel that citizen Intervenors are not equitably served or protected by the PUC process.

That screaming attack added to my conclusion that the proceedings in this case, from the beginning, were rigged against us citizen Intervenors at the PUC. This is further borne out by the Proposal for Decision in this case where the testimony of us as citizen Intervenors can be and is easily dismissed as “speculation” because we can’t afford to pay expert witnesses, so are entirely out-manuevered by wealthy corporate developers.

MACC’s *pro se* representative describes her experience:

The communication around the two Solar Developments (Chelsea Solar and Apple Hill Solar) to the community has been very inadequate or nonexistent. We wrongly understood from years ago that this project has been shot down. Once we became aware that in fact this case was not dead, my husband and I became alarmed at the effect it would have on the views from the golf course on this side of town.

As a resident of Vermont and business owner in Bennington whose interest is affected by this project, it is my right to become a party in this PUC case. I had no idea what I was getting into as I had no experience in this type of case with the PUC.

¹ <https://vermontersforacleanenvironment.wordpress.com/2018/10/12/vermont-public-utility-commission-public->

Being in that hearing was an experience I will never forget as a *pro se* party, as a community member trying to advocate for our town's assets, and more importantly my business and the aesthetic impact this solar development would have in Bennington and in Vermont.

We were treated with such disrespect and dismissiveness. We were called names. Our Pro Bono Lawyer was screamed at with such furor and threatened to be thrown out of the room as she very professionally requested specific information be included in the record. The Hearing Officer pointed fingers in a very hostile manner and this was just the beginning, a few minutes into the start of the hearing.

Throughout the hearing, The HO was not open to me showing visual materials that we were prepared to show since the Developer had failed to ever accurately draft the impact that their solar arrays would have on the aesthetics of our valley from our side of town and from our business. Their experts and witnesses were given plenty of opportunities to illustrate and reinterpret questions from our pro bono lawyer. The HO was biased and unfair. We were not treated with respect.

In my opinion, it was such a grotesque demonstration of abuse of power. Not the experience we wanted the visiting observers from China to have or witness first hand. Honestly I was embarrassed for our system as the HO was representing the US and Vermont to this foreign group but it was also very upsetting to see how biased he was the whole time.

It is fake or bogus to pretend that people like me or the VT Public community can have ANY input on these projects. The PUC, in this case, has given preferential treatment to the Developer leaving small business owners and residents exposed unfairly as they could never afford to embark on the level of litigation that this specific developer's business and legal strategy is based on. The whole process is like I am back in Venezuela living in a third world country where the laws or rules are overlooked every minute for personal interests.

In the PfD, the HO addresses the public comment received in the case, including that of

two State Senators concerned about the “inappropriate interaction between myself and the Intervenor’s counsel.” We understand from our Senators that this is the only response offered to the Senators who wrote on behalf of their constituents. It is unknown if the PUC sent the PfD to the Senators so they could read the HO’s response.

The HO admits, “My attempt to control the proceeding was overly aggressive and I have apologized to the Intervenor’s counsel.” However, the HO simply left a voicemail message for Intervenor’s counsel, but did not speak with her. The HO did not apologize to the public who was present, including Intervenor’s who are still shocked by what they experienced.

In the PfD, the HO goes on, “I regret my overly aggressive action and recommend that the Commission take no further action in response to these comments.” The HO’s recommendation is wholly inadequate, as he is asking the PUC to brush aside any concerns about his behavior. An apology is not enough. The HO should be censured or disqualified for tainting the hearing. The PUC must protect the public from future hostile and aggressive behavior by this HO.

6. Conclusion

This case has a convoluted history with a twisted procedural record of decisions and a tortured process on the part of the petitioner and the PUC HO, both of whom have engaged in overly aggressive behavior during the process.

This project is slightly reduced in size from the first iteration which the PSB denied, but the decrease of forest clearing of less than an acre is minimal and insufficient to address the issues that resulted in the PSB’s denial the first time. It is still in the RCON, on a highly visible prominent hillside that has important economic, aesthetic and pollution-mitigating values. The record is deficient in giving any idea of what the finished project would look like,

either alone or in conjunction with the already-approved contiguous Apple Hill Solar project.

Both projects together combine to create a de facto 4 MW solar array that will be shocking and offensive to the average person, if built, and do not conform to the requirements other developers must follow for Standard Offer projects. There has been no evaluation of the reduction in solar output due to the change in project design from 30° to 15° panel slope, something the Department of Public Service should have asked about since it is not a criterion on which citizen Intervenors can get standing.

For all the reasons stated above, the PUC should deny a CPG for this project.

Dated at Bennington, Vermont this 31st day of January, 2019.

Respectfully submitted,



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STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Petition of Chelsea Solar LLC, pursuant to	)	
30 V.S.A. § 248, for a certificate of public	)	
good authorizing the installation and	)	PUC Case No. 17-5024
operation of the “Willow Road Project,” a	)	
2.0 MW solar electric generation facility	)	
on Willow Road in Bennington, Vermont	)	

**REQUEST FOR ORAL ARGUMENT AND
COMMENT OF MOUNT ANTHONY COUNTRY CLUB AND
APPLE HILL HOMEOWNERS ASSOCIATION
ON HEARING OFFICER PROPOSAL FOR DECISION**

Mount Anthony Country Club (MACC) and Apple Hill Homeowners Association (AHHA) request the Public Utility Commission hold oral argument in this case.

MACC and AHHA submit these comments on the Hearing Officer’s Proposal for Decision.

MACC and AHHA recommend based on the record of evidence in this case that the Public Utility Commission must deny issuance of a Certificate of Public Good to Chelsea Solar LLC.

1. Clarifying That This Project Has Had Many Different Names

For clarification, MACC and AHHA recount the history of the name of this Project.

Petitioner was awarded a Standard Offer contract in 2013 under the name “Bennington Solar” for a 2 MW project on the same area of the same parcel of land as this petition. Petitioner petitioned for a CPG for a 2 MW project in 2014 under the name “Chelsea Solar” on the same area of the same parcel of land as this petition. Petitioner petitioned for a CPG for a 2 MW project in 2017 under the name “Chelsea Solar Project” on the same area of the same parcel of land. The Hearing Officer (HO) now refers to the 2 MW project on the same area of the same parcel of land as the original Bennington Solar, Chelsea Solar, and Chelsea Solar Project as the

“Willow Road Project.”

MACC and AHHA refer to the project as “Chelsea Solar 2” (CS2), consistent with the name we used in our Brief.

2. The Project Will Unduly Interfere With the Orderly Development of the Region

The Public Service Board denied a CPG for Chelsea Solar on February 16, 2016 in Docket No. 8302, finding that the Project would unduly interfere with the orderly development of the region. Specifically the PSB stated as follows (italics supplied to ensure easy identification of the PSB decision language):

We do not adopt the Hearing Officer’s conclusion (proposed finding 30) that the Project will not unduly interfere with the orderly development of the region because we find that the Project is inconsistent with the Bennington Town Plan and with the recommendations of municipal representatives contained in that plan.²² While the specific language in the Bennington Town Plan was not reviewed as an issue under the orderly development criterion in this Docket until after the Hearing Officer had issued his PFD, we nonetheless find it appropriate to discuss it here because the Town Plan language at issue is also applicable to the Section 248(b)(1) criterion, which states:

. . . With respect to an in-state facility, will not unduly interfere with the orderly development of the region with due consideration having been given to the recommendations of the municipal and regional planning commissions, the recommendations of the municipal legislative bodies, and the land conservation measures contained in the plan of any affected municipality.

For the reasons discussed below, the language of the Bennington Town Plan causes us to reject proposed finding 30. We also reject proposed finding 32 because it does not accurately reflect the Bennington Town Plan’s provisions regarding development in Bennington’s Rural Conservation Districts.²³

. . .

The Town Plan addresses all of the land area of the Town. It recognizes

the need for continued growth and promotes further concentrated development that may occur in the Urban Growth Area. The Town Plan also includes rural areas designated for less development. Specifically, the Town Plan states that “[a]lthough development will occur outside [the Urban Growth Area], it will be much less concentrated and shall not include new commercial uses because such uses are incompatible with the rural character of the area.”²⁶

Chelsea argues that “development is not precluded” at the Project site, relying on the prefiled testimony of Chelsea’s aesthetics consultant whose conclusion is reiterated at proposed finding 32.²⁷ A more complete and accurate characterization of the Rural Conservation Districts is that only limited residential development is permitted in the Rural Conservation Districts. While limited residential development is permitted, commercial development is prohibited with certain rural exceptions.²⁸

Bennington’s Rural Conservation Districts are located in valley areas outside the Urban Growth Area and have retained their rural and open-space character. The purpose of the Rural Conservation Districts is to preserve traditional rural and agricultural uses while accommodating low-density residential development. For example, the Town Plan states that “agriculture, forestry, very low density single-family residential development, and certain limited uses that are suitable in rural areas are permitted.”²⁹

The interchange at the junction of US Route 7 and VT Route 279 serves as the southwestern corner of the Rural Conservation District in which the Project is proposed. The area immediately to the west of Route 7 is in an Industrial District. The area immediately to the south of the interchange is part of a Mixed Residential District. The areas east of the Project site are in Rural Residential, Rural Conservation, and Agricultural Districts. The interchange highway complex thus serves as a boundary between developed urban and industrial areas in the western, central, and southern portions of Bennington, and minimally developed rural and agricultural areas in northeastern Bennington.³⁰

The Town Plan makes the following design standard applicable to any new development in the Rural Conservation Districts:

Specific design standards shall apply to new development in the Rural Conservation Districts in recognition of the existence of a concentration of agricultural and forest lands and to protect the extraordinary scenic resources such lands and uses provide. Any use in the Rural Conservation District, including single family dwellings, shall require approval under those regulatory guidelines. Development in this area cannot be sited in prominently visible locations on hillsides or ridgelines, shall utilize earth tone colors and non-reflective materials on exterior surfaces of all structures, and must minimize clearing of natural vegetation.³¹

This land conservation measure is made specifically applicable to the Project site by the Town of Bennington's Land Use Plan.³² While Chelsea has taken steps to limit the visibility of the Project on the hillside where it is proposed to be located, the clearing of 10.6 acres of existing vegetation runs directly afoul of this provision in the Town Plan and its vision for orderly future development.

...

For the reasons discussed above, we also disagree with the Hearing Officer's conclusion on orderly development. Rather, we find, based on our review of the Town Plan, that the Project will unduly interfere with the orderly development of the region because the Town Plan articulates specific land conservation measures applicable to the Project site that would be violated if the Project were to be constructed.

See Public Service Board Docket No. 8302 (Chelsea Solar LLC), Final Order dated February 16, 2016 at pages 50-55.

We believe that the PSB was correct in its interpretation of the Bennington Town Plan in its February 16, 2016 Decision and Order denying the first Chelsea project a CPG. We believe that any decision that disregards the legal holding that the Bennington Town Plan contains a clear written community standard for the RCON district, is erroneous whether that decision is made in this 2nd Chelsea Solar case or the Apple Hill Solar case, which is currently on appeal to

the Vermont Supreme Court on that very issue. The fact of the matter is that Petitioner abandoned its appeal of the PSB Decision in Docket No. 8302 and agreed to a voluntary dismissal; therefore, the PUC does not get to inexplicably disregard its prior holding that the Town of Bennington Town Plan contains a clear written community standard when this case involves the exact same parties, the exact same issues, and Petitioners were provided a full and fair opportunity to litigate the issues and in fact, they did! When the Petitioner chose a litigation strategy to dismiss their pending appeal to the Supreme Court and start over with a different project and a brand new application, they are subject to the preclusive effect of *res judicata* which will not permit the Petitioner to get a “do-over” or to have a second bite at the apple just because their litigation strategy backfired.

One can examine the issues that were raised on appeal to the Vermont Supreme Court by reviewing Petitioner’s Docketing Statement, which is attached for reference as is the Order of Dismissal Order of the Supreme Court and the PSB’s decision in Docket No. 8302. The Docketing Statement identifies the exact issue with regard to the PSB’s conclusion on aesthetics: that the Town Plan provides a clear, written community standards prohibiting the solar project in the RCON district, including the argument that PSB issued CPG’s to other facilities in the RCON zone, including before and after it denied Chelsea’s CPA. Petitioner/Appellant’s Statement of Issues to be Raised on Appeal states, *inter alia*:

- 3) Did the Board improperly apply the *Quechee* test by holding that the Town Plan provides a clear, written community standard prohibiting the solar project in the Bennington Rural Conservation ("RCON") zone, particularly when (i) the Town Plan contains no specific requirements that are legally enforceable, (ii) the actual zoning bylaws (which the Board intentionally ignored) permit the solar project in the RCON zone, (iii) the Town Plan and regional plans contain other goals supporting the project, (iv) the Board has in fact issued certificates of-public good to other facilities in the RCON zone, including before and after it denied Chelsea's

CPG?

Vermont Supreme Court Docket No. 2017-195. Appellant's Docketing Statement dated June 6, 2017, Exhibit B.

Thus, Petitioners had a full and fair opportunity to litigate the issues and in fact did raise the very issue within the aesthetics context and could have done so for the Orderly Development criterion. Consequently, Petitioner's voluntary dismissal of its appeal of Docket No. 8302, created a final judgment in the case which is now closed. There was no remand of the matter by the Supreme Court which returned jurisdiction of the case to the PSB. Instead, the Petitioner voluntarily dismissed the appeal, which is the legal equivalent to not having taken an appeal at all.

After dismissing the appeal to the Supreme Court, the Petitioner then filed a new application for a different 2 MW project on the same portion of the same parcel of land. Once the new Project Petition was deemed complete, the PUC assigned a new Docket number to the new case. Thus, the legal holding in Docket No. 8302, that the Town Plan contains a clear written community standard with regard to the RCON District, has been established and that Final Decision by the PSB, whether it was never appealed or appealed and then withdrawn or dismissed, is now *res judicata* and Petitioner is barred from re-litigating the legal holdings in Docket No. 8302 despite the PUC and HO's erroneous holding in this case and in the companion Apple Hill Solar case (to which the legal holding in Docket No. 8302 will bar re-litigation through the Doctrine of Collateral Estoppel, which is a topic of the pending appeal to the Supreme Court). Because all of the elements for *res judicata* exist between Chelsea 1 and Chelsea 2 (i.e. identity of parties, identity of issues, full and fair opportunity to litigate), the Petitioner cannot now reargue whether the Town Plan contains a clear written community standard for the RCON district. And the PUC IS bound by its prior legal holding.

We are hopeful that the PUC does not compound its prior erroneous inexplicable footnote holding in the Apple Hill Solar decision that indicates that the PUC believes that it is NOT bound by its prior decision and will carefully analyze the law so that the Supreme Court does not have to overturn and correct two cases. The law of the Town Plan has been established – that there is a clear written community standard. Now the job of the PUC is to apply that law to the facts of the new project to determine whether the new project violates the clear written community standard contained in the Town Plan’s RCON district.

Turning to the application of the law to the facts in this matter, it is noteworthy that Intervenor’s are now having to make arguments on this statutory criterion for the fourth time, because each of these cases -- Chelsea Solar and Apple Hill Solar’s original plans, Apple Hill Solar and Chelsea Solar 2 revised plans -- have had evidentiary hearings and briefing.

§ 248 (b) says “Before the Public Utility Commission issues a certificate of public good as required under subsection (a) of this section, it shall find that the purchase, investment, or construction:

(1) With respect to an in-state facility, will not unduly interfere with the orderly development of the region with due consideration having been given to the recommendations of the municipal and regional planning commissions, the recommendations of the municipal legislative bodies, and the land conservation measures contained in the plan of any affected municipality.”

Unfortunately, the role of the municipal and regional planning commissions and the municipal legislative bodies in this case have been tainted by the overly aggressive and litigious actions of the petitioner, which not only threatened to sue the Town, but acted on its threats by bringing suit in Superior Court against all of the above named bodies. The case was removed to Federal Court, after with petitioner withdrew the lawsuit. Petitioner then brought suit against the

municipal planning commissions and legislative bodies in the Environmental Division of Superior Court. While the Court correctly dismissed the case due to lack of jurisdiction, it did not allow the Town to recoup its legal expenses. The threat of endless litigation and expense in legal venues, including the PUC, resulted in the Town's withdrawal from this case the week of the evidentiary hearing. The Town accepted a payment that does not make the Town whole with regard to recovering its expenses. The settlement is evidence that the town withdrew under duress.

Regardless of the duress that caused the Town to withdraw from this case, the HO attempts to rely on the changing position of the Town in his proposal for decision recommending issuing a CPG for this project. The HO neglects to reference even once the important and credible testimony in the record by Bennington Planning Director Daniel Monks (INT-CROSS 1) that describes the Town's reasons for opposing the project because it does not comply with the Town Plan. The HO prefers to deflect from the Town Plan's clear intention to protect and conserve certain natural areas of town by focusing more on the changing position of the Town, while neglecting to acknowledge the undue financial duress inflicted on the Town by petitioner that caused the Town to remove itself from this case.

The HO erroneously cites to the approval of Apple Hill Solar on p. 19, claiming "the Town determined that the Apple Hill Solar Project would not unduly interfere with orderly development despite the potential cumulative impact of its location and the Town did not oppose this Project despite that cumulative impact." when the truth is that the Town's reasons for not opposing Apple Hill Solar were based on costs associated with participating in both projects. The Town *did not* determine that the Apple Hill Solar Project would not unduly interfere with the orderly development as a reason to not oppose the projects. This twisting of the truth is

prevalent in the HO's interpretation of this case and the associated Apple Hill Solar case.

Because petitioner successfully neutralized and tainted the positions of the municipal and regional planning commissions and legislative bodies through overly aggressive and expensive litigation, any statements from the Town that resulted from the litigation should be given no weight.

The PUC is left to consider the land conservation measures in the plan of Bennington to determine whether the project will unduly interfere with the orderly development of the region. Testimony of Bennington's Planning Director was submitted prior to petitioner's interference by litigation, and therefore should be considered. That testimony specifically addresses the land conservation measures in the plan, but the HO did not consider it in his PfD.

The record in this case, CS2, is the most developed regarding the effect of this project on the orderly development of the region. Bennington's Town Plan, as described in detail by Town Planning Director Daniel Monks which the HO chose to ignore entirely, contains clear written standards which this project does not comply with:

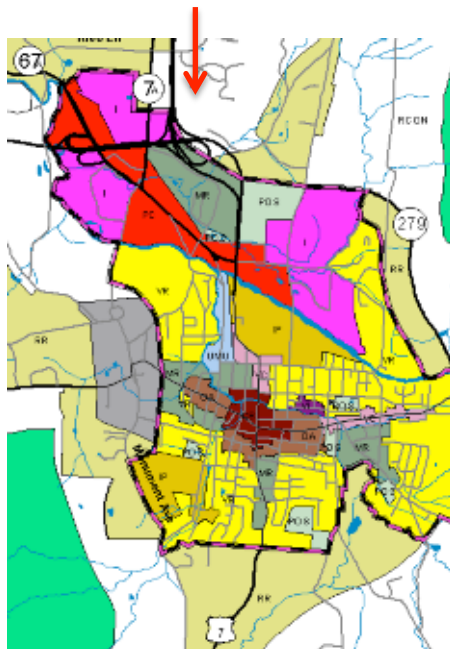
“ Specific design standards shall apply to new development in the Rural Conservation Districts in recognition of the existence of a concentration of agricultural and forest lands and **to protect the extraordinary scenic resources such lands and uses provide.**

Development in this area cannot be sited **in prominently visible locations on hillsides** or ridgelines, shall utilize earth tone colors and non-reflective materials on exterior surfaces of all structures, and **must minimize clearing of natural vegetation.** ...”
[emphasis added]

With the PUC's approval of the contiguous Apple Hill Solar project which also does not comply with the Town Plan, the HO proposes that the PUC find that clearing nearly 20 acres of forest from an important, prominently visible scenic hillside complies with the requirement to “minimize clearing of natural vegetation.”

Petitioner has attempted to confuse the facts about this project's specific site by bringing in other solar projects that have been approved by the PUC in the RCON district. As the PUC witnessed on the site visit for the two projects last year, the other solar projects mentioned by petitioner are not visible at all from the important vantage points. They do not contain the combination of elements specific to this site: prominently visible + hillside + gateway area + minimize clearing of natural vegetation. The other sites might contain one or two of those elements, but are in no way comparable to the importance of this specific site to the orderly development of the region.

The Town of Bennington has made important decisions regarding its land use districts. Industrial areas are outside the core area where the Town envisions protecting scenic natural beauty. This project sits precisely in the area the Town has identified through its planning documents as inappropriate for industrial or commercial development. Bennington's Future Land Use Map [Exhibit MACC-ML-5], which the HO did not reference, shows the industrial areas in purple, commercial areas in red, and Rural Conservation District in white.



PfD's Finding #93 says "The Project would expand the extent of development across Route 7 into the Rural Conservation District. Kane pf. at 4-5; exhs. PSD-DR-2 at 8-9, CS-BW-45 at 4, CS-MK-2 at 10-11, and CS-MB-2 at 14-15 and Figure 2." Both Petitioner's and Department of Public Service's witnesses agree that the proposed industrial solar project would change the project site from Rural Conservation to Commercial/Industrial. MACC and AHHA find it incredible that the HO has chosen to ignore this very important fact and does not see it as a reason to deny development in order to comply with the Town Plan's vision of how Bennington should develop.

The RCON standards are very specific regarding what is an acceptable visual impact in the RCON district. The image on the left is acceptable, and is how Libby Harris's home is viewed from nearly all current vantage points. The image on the right is not acceptable, and shows precisely what must occur if this project and its partner Apple Hill Solar are constructed.



Not only would the projects (together or separately) create an opening in the forest that is precisely what the Town plan says it does not want to see, it would also clear the trees that are currently screening Libby Harris's home from view from most vantage points.

Finding #93 also says "The existing visual character of the site is dominated by the extensive highway infrastructure and nearby commercial and industrial development." That may be true if viewed from the Welcome Center or Route 7 or the highway interchange, but is not an

accurate description of the visual character of the site as shown in the record. The HO's review of evidence again omits critically important information that would result in a different finding, if he had looked at it.

Specifically, the PfD contains no reference to Exhibit MACC-ML-1, which presents half a dozen professional photographer's images that include the project site. We would normally simply refer to the Exhibit, but since nobody, especially the HO, seems to have read our filings, we will show some of the images again here:





The evidence in the record that the HO did not address shows that the project site has economic value to the Town of Bennington. This specific site as documented by professional photographers is not dominated by the extensive highway infrastructure and nearby commercial industrial development, but on the contrary, is very important to the Town for maintaining its natural resources and scenic beauty, as required by the standards in the Rural Conservation District.

The Town of Bennington's careful long-range planning could not be clearer: Allow industrial and commercial development confined to certain areas, while protecting important natural resources and scenic beauty in specific areas, one of which is where this large industrial solar array is proposed. Nowhere in the Town Plan documents does the Town envision allowing an expansion of the commercial or industrial roads across Route 7 to include the prominent

Apple Hill hillside, which the record shows is exactly what will happen if this project is built.

The HO failed to address the evidence on Orderly Development. The HO's recommendation on this criterion should, therefore, be given no weight by the Commission. The PUC should deny a CPG because the project would unduly interfere with orderly development of the region, as the PSB correctly found in its decision denying Chelsea Solar 1 in 2016.

3. The Project Will Have an Undue Adverse Effect on the Aesthetics and Historic Sites

The prior legal holding in Docket No. 8302 is also *res judicata* with regard to the issue of aesthetics because that was also decided by the Final Decision of the PSB with regard to the Town Plan containing a clear written community standard which is one of the three prongs of the Quechee analysis; thus, the Petitioner is barred from re-litigating this issue by the Doctrine of *res judicata*. (See attached Docketing Statement, Exhibit B, Issue 3 and the language quoted *supra*) The PSB's Final Decision in Docket No. 8302 (which had been appealed to the Vermont Supreme Court but then voluntarily dismissed by the Petitioner) stated as follows (again italics added to help identify the PSB Final Decision language):

. . . Ms. Harris argues that the aesthetic impact of the Project would be undue because it would violate clear, written community standards found in the Town Plan and thus fails the first prong of the second part of the Quechee test, which states:

The next step in the two-part test, once a conclusion as to the adverse effect of the project has been reached, is to determine whether the adverse effect of the project is "undue." The adverse effect is considered undue when a positive finding is reached regarding any one of the following factors:

- 1. Does the project violate a clear, written community standard intended to preserve the aesthetics or scenic beauty of the area?³⁹*

Ms. Harris argues that limitations on development in the Rural Conservation District constitute a clear, written community standard that would be violated by the Project. We agree with Ms. Harris and therefore do not accept the Hearing Officer's recommendation on this point.

In order for a provision to be considered a clear, written community standard, it must be "intended to preserve the aesthetics or scenic beauty of the area" where the proposed project would be located and must apply to specific resources in the proposed project area.⁴⁰ A clear, written community standard must be more than simply "general in nature" and do more than seek "to promote good stewardship of scenic resources without identifying specific actionable standards."⁴¹

The Town Plan language for the Rural Conservation District creates four specific requirements: (1) only limited residential development is permitted,⁴² (2) no development may be sited in prominently visible locations on hillsides or ridgelines,⁴³ (3) any development must utilize earth-tone colors and non-reflective materials on exterior surfaces of all structures,⁴⁴ and (4) any development must minimize the clearing of natural vegetation.⁴⁵

The Project violates three⁴⁶ of these four specific requirements in the Town Plan for development in the Rural Conservation District. First, Chelsea Solar is not proposing a limited residential development. Second, while Chelsea has developed an extensive visual screening plan, the Project would remain visible on a hillside above the Vermont Welcome Center. And third, the Project calls for clear-cutting 10.6 acres of a densely forested and undeveloped 27-acre parcel. These proposed actions would violate this clear, written community standard in the Town Plan, and we therefore conclude that the Project fails the Quechee test.

Chelsea argues that the Town Plan language is merely a "recommendation."⁴⁷ We disagree.

The Town Plan states that “agriculture, forestry, very low density single-family residential development, and certain limited uses that are suitable in rural areas are permitted.”⁴⁸ The Town Plan also makes the following design standard applicable to any new development in Rural Conservation Districts:

Specific design standards shall apply to new development in the Rural Conservation Districts in recognition of the existence of a concentration of agricultural and forest lands and to protect the extraordinary scenic resources such lands and uses provide. Any use in the Rural Conservation District, including single family dwellings, shall require approval under those regulatory guidelines. Development in this area cannot be sited in prominently visible locations on hillsides or ridgelines, shall utilize earth tone colors and non-reflective materials on exterior surfaces of all structures, and must minimize clearing of natural vegetation.⁴⁹ (emphasis added)

In this case, we find that the Town Plan language is specific in nature, is specifically applicable to the Project site, and seeks to conserve scenic resources by identifying specific actionable requirements and thus constitutes a clear, written community standard.⁵⁰

*Chelsea further characterizes the Town Plan provisions describing the Rural Conservation District as “vague, amorphous” and “nebulous.”⁵¹ Chelsea maintains that these provisions are actually “zoning bylaws.”⁵² Chelsea argues that it would be “frivolous” to rely on the standards in the Town Plan for the Rural Conservation District because they “compel a specified outcome contrary to the intent of the Legislature in providing an exemption from zoning by-laws for Projects reviewed under Section 248, as well as to established Vermont law.”⁵³ We find this case distinguishable from our decision in Cold River, where *de facto* zoning bylaws were at issue.*

*In Cold River we found that Town of Rutland’s solar siting standards (the “Standards”), newly crafted in support of the Rutland Town Plan, were a *de facto* zoning bylaw and could not be relied upon as a clear, written community standard “for purposes of aesthetics review under § 248 because the Standards fail to identify this particular parcel as a scenic*

resource worthy of protection.”⁵⁴ Rather than being established as a site-specific set-aside for the purposes of aesthetics and conservation, as is the case here, the Standards in Cold River were a town-wide setback rule for solar projects. The Board concluded that:

In the instant case, recognizing the setback requirements in the Standards as a clear, written community standard would be tantamount to taking what is in substance a zoning bylaw, and by simply calling it something else, facilitating the circumvention of Section 248’s zoning bylaw exemption. In turn, this would amount to effectively condoning a mechanism that would frustrate the legislated policy behind exempting Section 248 projects from local zoning in the first instance.⁵⁵

The factual circumstances are different here. The standards for the Rural Conservation District were established to conserve the rural character of a particular area of Bennington, not to create town-wide setbacks for solar projects. The Rural Conservation District provisions in the Bennington Town Plan are not de facto zoning bylaws as argued by Chelsea.⁵⁶ Further, the Rural Conservation District language identifies specific actionable requirements.⁵⁷ The Town Plan’s language limiting development in the Rural Conservation District represents a clear, written community standard appropriately considered in a review under Section 248(b)(5) and the first prong of the second part of the Quechee test.

We appreciate the efforts of Chelsea and the Department to propose an unprecedented and costly vegetative screening plan to mitigate the visual impacts of the Project. However, our conclusion that the Project would violate a clear, written community standard intended to preserve the aesthetics or scenic beauty of the Project site and its surrounding area concludes our analysis of the aesthetic impacts of the Project using the Quechee test.⁵⁸

See Public Service Board Docket No. 8302 (Chelsea Solar LLC), Final Order dated February 16, 2016 at pages 55-60.

Intervenors re-allege and repeat their same argument offered above in the Orderly

Development section, as if fully set forth below with regard to the preclusive effect of the prior Final Decision in Docket No. 8302 on the issues of aesthetics, which was definitely established as the law of the case, i.e. that the Town Plan contains a clear written community standard such that Petitioners cannot satisfy the first prong of the Quechee analysis; therefore, we will not repeat those arguments again in full.

In addition to the above and foregoing, this Project introduces numerous aesthetic impacts that cannot be mitigated or have not been addressed by petitioner. It is undisputed in the record that clear-cutting nearly 10 acres of forest, now in conjunction with a similar clearing for the contiguous CPG-permitted Apple Hill Solar project, will increase wind and noise for residents of the Apple Hill development uphill. Petitioner's experts attempt to minimize those impacts, and AHHA does not have a gold mine sufficient to pay for all the experts that would have been necessary to refute the glowing claims of petitioner's experts, but the record does show that despite saying the increase in wind impacts and noise will be minimal, the petitioner's experts do admit that those impacts will increase.

Nowhere in the record does Petitioner address noise from construction, which is projected to occur for many months. AHHA opposes any Sunday work as anticipated by Petitioner which the HO says should be allowed. The HO attempts to minimize the impacts of construction, which include chainsaws, perhaps cutter/feller/bunchers, and chippers all of which are known to produce high noise levels of which the record is totally deficient.

Petitioner has failed to present any visual simulations whatsoever of important views as documented by professional photographers (see p. 9). Petitioner has also failed to present a single simulation of the numerous vantage points from the Mount Anthony Country Club.



This is not an insignificant omission. If, as claimed, the distance of approximately one mile mitigates the view from the Country Club, petitioner's two experts could easily have shown what the two projects together would look like when constructed. Since the record is devoid of any simulations that document the project as built, a CPG should not be issued for this project as the Petitioner has not met its burden of proof. The HO neglects to mention this important deficiency.

The aesthetic impacts from Bennington's Battle Monument are also minimized by Petitioner and the HO. Vermont's Department of Historic Preservation inexplicably entered a letter of "no impact" even before the pre-hearing conference for this project had been held, and long before evidence by Intervenors was submitted, which says more about the cursory examination of VDHP than the actual impacts the project would have on the historic resource.

The narrative being used to support minimal impact from the Bennington Battle Monument is that the project site is only visible through a narrow window. That concept ignores the fact that people not only see the project site hillside directly out the narrow window, but it is common practice for visitors to hold their cameras out the openings and take photos such as this

one that is in the evidentiary record, though nowhere mentioned by the HO in the PfD. This photo did not appear by magic, it is what people experience and further supports the reasons for the standards in the Town Plan's RCON intended to preserve this site's natural beauty.



CS2 will unduly adversely impact the aesthetics of the extremely important historic Bennington Battle Monument. Separately or in conjunction with Apple Hill Solar, the two projects' cumulative effect will be a major change in the aesthetics of the region that are unduly adverse. The PUC should deny a CPG for this project because it will result in an unduly adverse aesthetic impact.

4. Other issues: Wildlife, Air Pollution, Water Pollution, Cumulative Impact of What Is Functionally One 4 MW Solar Array

Given how little weight our intervention in this case has been given, we will simply recount what is common sense based on living in the area that we believe should be considered by the PUC in deciding to deny a CPG for this project: cutting the forest will remove important air pollution mitigation resources, will displace wildlife, create possible public safety issues, and has the potential to change the flows of PFOA-contaminated groundwater. These are extremely

important issues for the residents of the Apple Hill Homeowners' Association, which is already experiencing increased traffic noise since the highway interchange was built, and for whom the contamination of our water supplies by a toxic chemical is having a negative impact. Why this project is more important than the quality of our lives and our health is something we will never understand. There are many, many appropriate locations for large scale solar arrays in the town of Bennington. This site is not at all appropriate, yet nothing we say seems to matter.

If the PUC agrees with the HO and approves this project in immediate proximity to Apple Hill Solar, it will be doing a grave disservice to the region and the State of Vermont. We believe that Public Service Board member John Burke got it right in his dissent of May 22, 2013 in which he cited an October 16, 2009 Order in Docket 7533 which clarified the rules for Standard Offer projects:

I would have disqualified the Bennington Solar Project and the Apple Hill Solar Project proposals since both proposals are located on the same parcel of land and have similar interconnection points.

...any collection of generation components that meets the definition of a plant, and exceeds the 2.2 MW cap, shall be removed from the queue, although the generation components may reapply for the standard offer if the scope of the project is adjusted to comply with the 2.2 MW cap.

Without any evidence in the record to show the aesthetic impact of both projects, if CS2 is approved, the PUC is effectively rubber stamping one 4 MW solar array on a prominent hillside in Bennington's Rural Conservation District, in violation of the Town Plan's clear written community standard for the specific site and in exceedence of the 2.2 MW cap for Standard Offer projects. Both projects propose to be constructed and operated via Willow Road, both projects require the same one mile power line extension, and any claims that they have separate points of interconnection or are using separate roads are simply gimmicks to game the rules.

5. Role of Hearing Officer and Procedural Issues

Participation in this case was a disturbing experience for members of the public. Two intervenors withdrew after the HO failed to respond to a timely request to quash depositions that Petitioner scheduled in Burlington in violation of the rules for depositions. The HO issued an order on the morning of the day of the scheduled depositions, at a time when the two intervenors would have had to already be driving to Burlington to get to the depositions in time. One long-time intervenor withdrew due to health reasons that resulted from the stress of intervening in the two cases on the same site in four different proceedings beginning in 2014, and the PUC's determination that they would not quash the deposition of that intervenor.

However, nothing that occurred prior to the evidentiary hearing prepared us for what happened at the evidentiary hearing.

AHHA's *pro se* representative describes her experience:

My experience as a citizen Intervenor at the PUC during the hearing for Chelsea Solar was stressful and mostly negative. In addition to being ignorant about and unaccustomed to the procedures and expectations, it was preceded by a very negative phone call experience during a Status Conference about the project. That phone call was opened by the Hearing Officer verbally chastising us as Intervenor for not being lawyers (yes — we were painfully aware of that!) and not behaving appropriately in handling the blizzard of constant emails by the developers. He singled us out for criticism, in my opinion, entirely unfairly, and that set a tone of antagonism against us and our pro-bono attorney which was then carried forward during the in-person hearing later, in September.

During the hearing there were a number of times when the Hearing Officer coached the witnesses for the developers. As an inexperienced participant it seemed very noticeable to me that when those witnesses were being evasive, he turned to them in a friendly manner and helped them answer, or interpreted what he thought they really meant or were trying to say. I was shocked. He never helped our witnesses.

When our pro bono attorney attempted to preserve an off the record discussion for the record within ten minutes of going on the record on the first day of the hearing, the Hearing Officer screamed at her and threatened to throw her out of the room if she continued speaking.¹ That reaction on his part was so negative and shocking to me as an average person. Later in the day, the Hearing Officer again threatened our attorney to “take it outside” after she attempted to get a hostile witness for the developer to answer the questions she was asking. Instead of properly addressing the witness and advising him to “answer the question you are asked,” the Hearing Officer yelled at our attorney again. Our attorney’s tone was quiet and respectful but correctly forceful in seeking information from the witness, but the Hearing Officer’s tone was so utterly disrespectful and entirely disproportionate. It made feel that citizen Intervenors are not equitably served or protected by the PUC process.

That screaming attack added to my conclusion that the proceedings in this case, from the beginning, were rigged against us citizen Intervenors at the PUC. This is further borne out by the Proposal for Decision in this case where the testimony of us as citizen Intervenors can be and is easily dismissed as “speculation” because we can’t afford to pay expert witnesses, so are entirely out-manuevered by wealthy corporate developers.

MACC’s *pro se* representative describes her experience:

The communication around the two Solar Developments (Chelsea Solar and Apple Hill Solar) to the community has been very inadequate or nonexistent. We wrongly understood from years ago that this project has been shot down. Once we became aware that in fact this case was not dead, my husband and I became alarmed at the effect it would have on the views from the golf course on this side of town.

As a resident of Vermont and business owner in Bennington whose interest is affected by this project, it is my right to become a party in this PUC case. I had no idea what I was getting into as I had no experience in this type of case with the PUC.

¹ <https://vermontersforacleanenvironment.wordpress.com/2018/10/12/vermont-public-utility-commission-public->

Being in that hearing was an experience I will never forget as a *pro se* party, as a community member trying to advocate for our town's assets, and more importantly my business and the aesthetic impact this solar development would have in Bennington and in Vermont.

We were treated with such disrespect and dismissiveness. We were called names. Our Pro Bono Lawyer was screamed at with such furor and threatened to be thrown out of the room as she very professionally requested specific information be included in the record. The Hearing Officer pointed fingers in a very hostile manner and this was just the beginning, a few minutes into the start of the hearing.

Throughout the hearing, The HO was not open to me showing visual materials that we were prepared to show since the Developer had failed to ever accurately draft the impact that their solar arrays would have on the aesthetics of our valley from our side of town and from our business. Their experts and witnesses were given plenty of opportunities to illustrate and reinterpret questions from our pro bono lawyer. The HO was biased and unfair. We were not treated with respect.

In my opinion, it was such a grotesque demonstration of abuse of power. Not the experience we wanted the visiting observers from China to have or witness first hand. Honestly I was embarrassed for our system as the HO was representing the US and Vermont to this foreign group but it was also very upsetting to see how biased he was the whole time.

It is fake or bogus to pretend that people like me or the VT Public community can have ANY input on these projects. The PUC, in this case, has given preferential treatment to the Developer leaving small business owners and residents exposed unfairly as they could never afford to embark on the level of litigation that this specific developer's business and legal strategy is based on. The whole process is like I am back in Venezuela living in a third world country where the laws or rules are overlooked every minute for personal interests.

In the PfD, the HO addresses the public comment received in the case, including that of

two State Senators concerned about the “inappropriate interaction between myself and the Intervenor’s counsel.” We understand from our Senators that this is the only response offered to the Senators who wrote on behalf of their constituents. It is unknown if the PUC sent the PfD to the Senators so they could read the HO’s response.

The HO admits, “My attempt to control the proceeding was overly aggressive and I have apologized to the Intervenor’s counsel.” However, the HO simply left a voicemail message for Intervenor’s counsel, but did not speak with her. The HO did not apologize to the public who was present, including Intervenor’s who are still shocked by what they experienced.

In the PfD, the HO goes on, “I regret my overly aggressive action and recommend that the Commission take no further action in response to these comments.” The HO’s recommendation is wholly inadequate, as he is asking the PUC to brush aside any concerns about his behavior. An apology is not enough. The HO should be censured or disqualified for tainting the hearing. The PUC must protect the public from future hostile and aggressive behavior by this HO.

6. Conclusion

This case has a convoluted history with a twisted procedural record of decisions and a tortured process on the part of the petitioner and the PUC HO, both of whom have engaged in overly aggressive behavior during the process.

This project is slightly reduced in size from the first iteration which the PSB denied, but the decrease of forest clearing of less than an acre is minimal and insufficient to address the issues that resulted in the PSB’s denial the first time. It is still in the RCON, on a highly visible prominent hillside that has important economic, aesthetic and pollution-mitigating values. The record is deficient in giving any idea of what the finished project would look like,

either alone or in conjunction with the already-approved contiguous Apple Hill Solar project.

Both projects together combine to create a de facto 4 MW solar array that will be shocking and offensive to the average person, if built, and do not conform to the requirements other developers must follow for Standard Offer projects. There has been no evaluation of the reduction in solar output due to the change in project design from 30° to 15° panel slope, something the Department of Public Service should have asked about since it is not a criterion on which citizen Intervenors can get standing.

For all the reasons stated above, the PUC should deny a CPG for this project.

Dated at Bennington, Vermont this 31st day of January, 2019.

Respectfully submitted,



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ENTRY ORDER

SUPREME COURT DOCKET NO. 2017-195

VERMONT SUPREME COURT
FILED IN CLERK'S OFFICE

NOVEMBER TERM, 2017

NOV 08 2017

In re Petition of Chelsea Solar LLC
(Allco Renewable Energy Limited*)

} APPEALED FROM:
}
}
}
} Public Utility Commission
}
} DOCKET NO. 8302
}

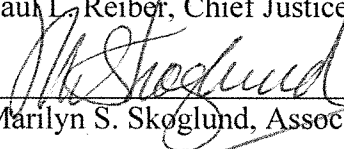
In the above-entitled cause, the Clerk will enter:

Pursuant to appellant's request, the above-captioned appeal is dismissed.

BY THE COURT:



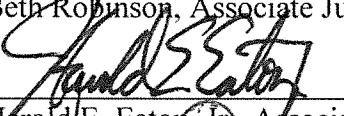
Paul L. Reiber, Chief Justice



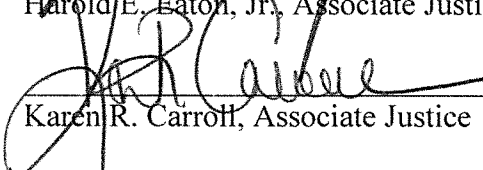
Marilyn S. Skoglund, Associate Justice



Beth Robinson, Associate Justice



Harold E. Eaton, Jr., Associate Justice



Karen R. Carroll, Associate Justice

VERMONT SUPREME COURTCircle One: Appellant ☒ Appellee

DOCKETING STATEMENT

Appealed From:

Allco Renewable Energy Limited

Plaintiff

Circle One: Appellant ☒ Appellee

V.

Vermont Public Service Board

Court/Administrative Agency

Docket No. 8302

(Trial Court Docket No.)

Vermont Public Service Board

Defendant

Circle One: Appellant

Appellee ☒2017-195

(Supreme Court Docket No. if known)

* Appellee need not complete sections A., B., or C. unless appellee disagrees with appellant's answers.

A. Court/Counsel

- 1) Trial Judge: N/A
- 2) Trial Counsel for Plaintiff: Michael Melone and Thomas Melone
- 3) Trial Counsel for Defendant: N/A
- 4) Counsel in Supreme Court for Plaintiff: Michael Melone and Thomas Melone
- 5) Counsel in Supreme Court for Defendant: TBD
- 6) Please list other parties and their counsel: Vermont Department of Public Service-Jeannie Elias
Town of Bennington-Rob Woolmington; Agency for Natural Resources-Don Einhorn; Libby Harris, pro se.
- 7) Date of Decision Being Appealed: 2/16/16, 4/14/17, 4/17/17
- 8) Date Notice of Appeal Filed: 5/12/17

B. Criminal Cases

- 1) Was defendant given a sentence of imprisonment? _____
- 2) If so, what is the sentence? _____
- 3) If so, has the sentence been stayed pending appeal? _____
- 4) If the sentence has not been stayed, when did the defendant begin service of the sentence? _____
- 5) What penalty other than a sentence has been imposed? Please describe: _____
- 6) Was trial counsel appointed or retained? _____

C. Brief Description of Nature of Case and Result

(Include a summary of facts and the procedural history. Separate page may be attached.)

See attached Exhibit A

D. Statement of Issues To Be Raised on Appeal

(Appellant should state each question in a separately numbered paragraph. Appellee should briefly state position on each question enumerated by appellant and state any cross-appeal questions. All parties should read V.R.A.P. 10(b) before completing this section. Separate pages may be attached.)

See attached Exhibit B

E. Copy of Decision Appealed From To Be Attached.

Was there a written decision? ☒ Yes No (Circle One)

A copy of the written decision, order, or opinion appealed from must be attached.

F. Inventory of Hearings; Transcripts Ordered.

The appellant must list every recorded hearing which was held in this matter, including the date, the type of hearings (e.g., pretrial, suppression, status conference, trial) and the stenographer for each. If the hearing was tape-recorded, so state instead of naming the stenographer. Attach additional pages if needed. (NOTE: Transcript(s) must be ordered within ten days of notice of appeal; the attorney ordering the transcript(s) must serve copies of each order upon the clerk of the Supreme Court and all parties, as well as the trial court. See V.R.A.P. 10(b)(1).)

Date of hearing	Length of hearing days/hours	Type of hearing	Reporter's name (or "TAPE")	Transcript necessary for appeal?*	Date necessary transcript ordered
8/25/14	3 hours	Prehearing Conference	TAPE	Yes	already available
10/16/14	3 hours	Public Hearing	TAPE	Yes	already available
1/29/15	1 hour	Status Conference	TAPE	Yes	already available
7/16/15	4 hours	Technical Hearing	TAPE	Yes	already available

Does the appellee agree as to which transcript(s) are essential for the appeal? ☒ Yes No (Circle One)
If not, indicate name(s), date(s), and reporter(s) of additional transcript(s) needed.

G. Conference; Expedited Resolution

(1) Do you request a conference with a staff attorney to discuss either settlement or expedited resolution? (Most conferences are done by telephone.) ☒ Yes No (Circle One)

(2) Is this matter appropriate for expedited disposition by a three-justice panel pursuant to V.R.A.P. 33.1 and the criteria set forth in V.R.A.P. 33.2? Yes ☒ No (Circle One)

Please Explain.

A full court opinion, issued after briefing and submission to the full Court, is necessary because this case involves provisions of law that are important to Vermont's renewable energy goals, and the development of renewable energy projects in Vermont.

Submitted by: Chelsea Solar LLC

(Typed name of party)

Dated: 6/6/17

Signed: _____

(Signature of attorney/pro se)

Address: Thomas Malone
Alco Renewable Energy Limited, 14 Wall Street, 20th Floor
NY, NY 10005

* If no transcripts are necessary for appeal, check here []

EXHIBIT A

BRIEF DESCRIPTION OF NATURE OF CASE AND RESULT

On June 19, 2014, Chelsea Solar LLC ("Chelsea") filed a petition (the "Petition") with the Vermont Public Service Board (the "Board") including supporting testimony and exhibits, requesting a certificate of public good ("CPG") under 30 V.S.A. §248 to install and operate a 2.0 MW AC solar electric generating facility at 500 Apple Hill Road, Bennington, Vermont (the proposed "Project"). Prior to filing the Petition, Chelsea had provided a timely 45-day notice to the Town of Bennington (the "Town") and other required persons.

All neighbors of the Project site, including neighbor Libby Harris ("Harris"), received notice of the Petition on June 19, 2014. Harris first filed a motion to intervene in the proceeding (Board Docket No. 8302) on August 4, 2014, which motion was denied without prejudice by the hearing officer for the Board on August 25, 2014, for lack of conforming to Board Rule 2.209. The deadline for Harris and all other interested parties to file a motion to intervene was October 31, 2014. Harris did not file her second Motion to Intervene until March 19, 2015, and, despite being filed nearly 6 months after the deadline, was approved on April 16, 2015, on a permissive basis limited to providing timely testimony on the technical issues of orderly development, aesthetics, wind and noise provided by individuals capable of being qualified as experts in those areas.

All outstanding issues concerning the Project among Chelsea, the Vermont Agency of Natural Resources ("ANR") and the Vermont Department of Public Service ("DPS") were resolved pursuant to the memorandums of understandings dated February 9, 2015, and June 17, 2015 with DPS, and dated January 16, 2015, and June 15, 2015, with ANR (collectively, the "MOUs").

A technical hearing was conducted on July 16, 2015. On October 2, 2015, the Hearing Officer issued a proposal for decision ("PFD"). In the PFD, the Hearing Officer recommended that the Board approve the Project subject to certain conditions. On August 12, 2015, the Town noticed a special Select Board meeting to discuss the Chelsea project. Chelsea was not notified or invited to the meeting. On August 13, 2015, the Town Select Board held a special meeting to discuss the Project and the neighboring Apple Hill Solar project (the "Apple Hill Project"), which was the subject of this Court's decision in *In re: Programmatic Changes to the Standard-Offer Program*, docket 2013-308, 2014 VT 29. At the special meeting, false information was presented to the Select Board concerning the Project. Relying on such false information, the Select Board voted to engage the Town Attorney to intervene on the Town's behalf before the Board in order to oppose the Project and the Apple Hill Project.

On October 13, 2015, Harris filed comments on the PFD, raising for the first time in the proceedings, whether the Project would violate a clear, written community standard in the Bennington Town Plan. On January 6, 2016, the Board issued an Order providing the parties with an opportunity to comment on the issue of whether there is language in the Town Plan that constitutes a clear, written community standard for the area in which the Project is proposed to

be cited (the "January 6 Order"). The Board observed that Ms. Harris had raised this issue for the first time in her comments on the PFD.

On January 15, 2016, Chelsea filed a response to the January 6 Order. On February 16, 2016, the Board issued an order finding that the Project would unduly interfere with the orderly development of the region and would have an undue, adverse impact on aesthetics, and thus denied Chelsea's petition for a CPG (the "February 16 Order").

On February 25, 2016, Chelsea made a motion for the enlargement of time under V.R.C.P. 52 and 59 to file post-order motions, which was granted by the Board on the same day. On March 14, 2016, Chelsea filed three motions requesting that the Board: (1) vacate the February 16 Order ("Motion to Vacate") because the Board failed to comply with 3 V.S.A. §811 by not issuing a proposed decision adverse to Chelsea prior to issuing a final decision, (2) reopen discovery ("Motion to Reopen Discovery"), and (3) take judicial notice of certain documents ("Request for Judicial Notice").

On February 29, 2016, the Town filed a motion to intervene and was granted intervention status. On March 21, 2016, Chelsea filed motions requesting that the Board: (1) alter or amend its February 16 Order ("Motion for Reconsideration") and (2) order a supplementary hearing to make new findings ("Motion for a Supplementary Hearing"). Chelsea also filed an amendment to its June 19, 2014, petition ("Amendment").

On April 29, 2016, DPS filed comments opposing the Chelsea filings of March 14 and March 21 (the "DPS April 29 Comments"). On May 5, 2016, the Vermont Agency of Natural Resources ("ANR") filed comments supporting the DPS April 29 Comments (the "ANR May 5 Comments").

On May 13, 2016, Chelsea filed a motion requesting that the Board strike the DPS April 29 Comments and the ANR May 5 Comments (the "Motion to Strike") based upon the DPS' and ANR' breach of their obligations under the MOUs. Chelsea also filed a request for an evidentiary hearing pursuant to V.R.C.P. § 78(b)(2) (the "Motion for an Evidentiary Hearing"). On January 24, 2017, Chelsea filed a motion for mediation pursuant to V.R.C.P. § 16.3 (the "Motion for Mediation").

On April 14, 2017, the Board issued an Order (the "April 14 Order") denying (i) the Motion to Vacate, (ii) the Motion to Reopen Discovery, (iii) the Request for Judicial Notice, (iv) the Motion for Reconsideration, (v) the Motion for a Supplementary Hearing, (vi) the Amendment, (vii) the Motion to Strike, (viii) the Motion for an Evidentiary Hearing and (ix) the Motion for Mediation. Shortly thereafter, the Board realized the basis on which it denied some of Chelsea's motions—untimeliness—was clearly erroneous, and thus on April 17, 2017, the Board amended the April 14 Order to remove untimeliness as a basis for denial. A timely notice of appeal was filed on May 12, 2017.

EXHIBIT B

STATEMENT OF ISSUES TO BE RAISED ON APPEAL

- 1) Did the Vermont Public Service Board (the "Board") err by denying Chelsea Solar LLC's ("Chelsea's") petition for a certificate of public good for its 2.0 megawatt solar facility?
- 2) Did the Board violate 3 V.S.A. § 811 by failing to issue a proposed decision adverse to Chelsea before issuing its final order?
- 3) Did the Board improperly apply the *Quechee* test by holding that the Town Plan provides a clear, written community standard prohibiting the solar project in the Bennington Rural Conservation ("RCON") zone, particularly when (i) the Town Plan contains no specific requirements that are legally enforceable, (ii) the actual zoning bylaws (which the Board intentionally ignored) permit the solar project in the RCON zone, (iii) the Town Plan and regional plans contain other goals supporting the project, (iv) the Board has in fact issued certificates of public good to other facilities in the RCON zone, including before and after it denied Chelsea's CPG?
- 4) Did the Board err in denying Chelsea's request for judicial notice?
- 5) Did the Board err in denying Chelsea's motion to reopen discovery to regarding the new defense raised by an intervenor post-hearing?
- 6) Did the Board err in denying Chelsea's amendment to its petition for a CPG?
- 7) Did the Board err in denying Chelsea's motions for reconsideration, to reopen and for new hearings, and for new and additional findings?
- 8) Did the Board violate 3 V.S.A. §809(c)?
- 9) Did the Board violate Chelsea's rights to due process and equal protection?
- 10) Did the Board err in denying Chelsea's motions to strike?
- 11) Did the Board err by relying on arguments that would not have been presented but for the Department of Public Service's and the Agency of Natural Resources' breach of their obligations under the memorandum of understandings with Chelsea?
- 12) Did the Board otherwise err by denying Chelsea's petition for a CPG, and/or Chelsea's post-final order motions and amendment?

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 8302

Petition of Chelsea Solar LLC for a certificate of)
public good, pursuant to 30 V.S.A. § 248, authorizing)
the installation and operation of a 2.0 MW solar)
electric generation facility at 500 Apple Hill Road,)
Bennington, Vermont)

Hearing at
Montpelier, Vermont
July 16, 2015

Order entered: 2/16/2016

PRESENT: Michael E. Tousley, Esq., Hearing Officer

APPEARANCES: Michael Melone, *pro se*
Thomas Melone, *pro se*
for Chelsea Solar LLC

Jeanne Elias, Esq.
for Vermont Department of Public Service

Donald Einhorn, Esq.
for Vermont Agency of Natural Resources

Libby Harris, *pro se*

On January 22, 2016, the Vermont Agency of Natural Resources (“ANR”) filed a response to the Chelsea PFD Response (the “ANR Comments”) criticizing Chelsea’s descriptions of how the Board reviews impacts under Section 248(b)(5).

No other parties filed comments.

Having considered the comments on the PFD and the Chelsea PFD Response, we do not adopt the Hearing Officer’s recommendation that we approve the Project.

Issues Raised by Ms. Harris

1. Orderly Development of the Region

In the PFD, the Hearing Officer recommends that we find that the Project will not unduly interfere with the orderly development of the region because the Project is largely consistent with the Bennington Town Plan, with due consideration having been given to the recommendations of the municipal and regional legislative bodies.

We do not adopt the Hearing Officer’s conclusion (proposed finding 30) that the Project will not unduly interfere with the orderly development of the region because we find that the Project is inconsistent with the Bennington Town Plan and with the recommendations of municipal representatives contained in that plan.²² While the specific language in the Bennington Town Plan was not reviewed as an issue under the orderly development criterion in this Docket until after the Hearing Officer had issued his PFD, we nonetheless find it appropriate to discuss it here because the Town Plan language at issue is also applicable to the Section 248(b)(1) criterion, which states:

... With respect to an in-state facility, will not unduly interfere with the orderly development of the region with due consideration having been given to the recommendations of the municipal and regional planning commissions, the recommendations of the municipal legislative bodies, and the land conservation measures contained in the plan of any affected municipality.

For the reasons discussed below, the language of the Bennington Town Plan causes us to reject proposed finding 30. We also reject proposed finding 32 because it does not accurately

22. The language of the Bennington Town Plan was identified as an aesthetics concern in the Harris PFD Comments and will be further addressed below under our discussion of aesthetics.

reflect the Bennington Town Plan's provisions regarding development in Bennington's Rural Conservation Districts.²³

Chelsea argues that "[n]o evidence has been presented by any party in this Docket that contradicts the evidence provided by the Petitioner with respect to the Project's conformance with the Town Plan."²⁴ We disagree. Chelsea presented evidence, in the form of excerpts from the Town Plan in exhibit CS-MK-3, a full reading of which contradicts Chelsea's argument that the Project "is consistent with the Town Plan."²⁵

The Town Plan addresses all of the land area of the Town. It recognizes the need for continued growth and promotes further concentrated development that may occur in the Urban Growth Area. The Town Plan also includes rural areas designated for less development. Specifically, the Town Plan states that "[a]lthough development will occur outside [the Urban Growth Area], it will be much less concentrated and shall not include new commercial uses because such uses are incompatible with the rural character of the area."²⁶

Chelsea argues that "development is not precluded" at the Project site, relying on the prefiled testimony of Chelsea's aesthetics consultant whose conclusion is reiterated at proposed finding 32.²⁷ A more complete and accurate characterization of the Rural Conservation Districts

23. The Town of Bennington ("Bennington") filed comments on this Project after the Hearing Officer issued the PFD. These comments led us to review more closely the language of the Town Plan in light of the Hearing Officer's proposed findings 30 and 32. Because Bennington did not intervene in this Docket, its comments have not been entered into evidence. Consequently, our determination relies solely upon the specific language of the Town Plan, which was entered into evidence by Chelsea.

24. Chelsea PFD Response at 3.

25. Chelsea PFD Response at 2. The entire Town Plan was not admitted into evidence. For example, in the Chelsea PFD Comments, Chelsea cites to section 9.2 of the Town Plan at page 100. This part of the Town Plan was not included in the excerpts and therefore was not admitted into evidence as part of exhibit CS-MK-3.

26. Exh. CS-MK-3 at 16.

27. Chelsea PFD Response at 3. Citing table 3.13 of the Bennington zoning rules attached as "Exhibit A" to the Chelsea PFD Response, Chelsea argues that certain allowable uses in Rural Conservation Districts include "electrical facilities." Exhibit A is not in evidence because Chelsea failed to offer it into the record; therefore we cannot rely on Exhibit A in making our determination. Even if we were to consider Exhibit A as the Petitioner argues, the list of
(continued...)

is that only limited residential development is permitted in the Rural Conservation Districts. While limited residential development is permitted, commercial development is prohibited with certain rural exceptions.²⁸

Bennington's Rural Conservation Districts are located in valley areas outside the Urban Growth Area and have retained their rural and open-space character. The purpose of the Rural Conservation Districts is to preserve traditional rural and agricultural uses while accommodating low-density residential development. For example, the Town Plan states that "agriculture, forestry, very low density single-family residential development, and certain limited uses that are suitable in rural areas are permitted."²⁹

The interchange at the junction of US Route 7 and VT Route 279 serves as the southwestern corner of the Rural Conservation District in which the Project is proposed. The area immediately to the west of Route 7 is in an Industrial District. The area immediately to the south of the interchange is part of a Mixed Residential District. The areas east of the Project site are in Rural Residential, Rural Conservation, and Agricultural Districts. The interchange highway complex thus serves as a boundary between developed urban and industrial areas in the western, central, and southern portions of Bennington, and minimally developed rural and agricultural areas in northeastern Bennington.³⁰

The Town Plan makes the following design standard applicable to any new development in the Rural Conservation Districts:

Specific design standards shall apply to new development in the Rural Conservation Districts in recognition of the existence of a concentration of

27. (...continued)
allowable uses in Exhibit A is arguably not inconsistent with the limited rural and residential development permitted in Rural Conservation Districts. The language of Exhibit A states that "public facilities (e.g., electric facilities)" are allowed. This language would appear to permit the expansion of public utilities infrastructure as a necessary part of allowable residential development, rather than support the development of commercial generation projects.

28. Exh. CS-MK-3 at 16 and 26.

29. Exh. CS-MK-3 at 26.

30. Exh. CS-MK-3 at 31.

agricultural and forest lands and to protect the extraordinary scenic resources such lands and uses provide. Any use in the Rural Conservation District, including single family dwellings, shall require approval under those regulatory guidelines. Development in this area cannot be sited in prominently visible locations on hillsides or ridgelines, shall utilize earth tone colors and non-reflective materials on exterior surfaces of all structures, and must minimize clearing of natural vegetation.³¹

This land conservation measure is made specifically applicable to the Project site by the Town of Bennington's Land Use Plan.³² While Chelsea has taken steps to limit the visibility of the Project on the hillside where it is proposed to be located, the clearing of 10.6 acres of existing vegetation runs directly afoul of this provision in the Town Plan and its vision for orderly future development.

In its reply brief, Chelsea argues that "[t]he only testimony in this [D]ocket concerning the orderly development of the region, aesthetics, wind and noise supports the conclusion that the Petitioner satisfies the requirements of 30 V.S.A. §§ 248(b)(1) and (b)(5)."³³ In support of this argument, Chelsea cites the testimony of its aesthetics expert. Upon review, we find this testimony to be an inaccurate description of the Town Plan. Having been given an additional opportunity after its reply brief to comment directly on the issue Ms. Harris has raised about the Town Plan, Chelsea now argues that "municipal enactments . . . are advisory rather than

31. Exh. CS-MK-3 at 26.

32. Exh. CS-MK-3 at 31.

33. Reply Brief at 8.

controlling”³⁴ and reiterates its earlier conclusion that “the Project will not unduly interfere with the orderly development of the region.”³⁵ We reject Chelsea’s conclusion.

For the reasons discussed above, we also disagree with the Hearing Officer’s conclusion on orderly development. Rather, we find, based on our review of the Town Plan, that the Project will unduly interfere with the orderly development of the region because the Town Plan articulates specific land conservation measures applicable to the Project site that would be violated if the Project were to be constructed.

Ms. Harris further argues that the Hearing Officer failed to address evidence that the Project would interfere with orderly development because the Project would create a through road, linking Apple Hill Road, a private road that runs through a residential area north of the Project site where commercial traffic is prohibited, with Willow Road, a public road south of the Project site, and thus allow commercial traffic onto Apple Hill Road in violation of deed restrictions.

While acknowledging that the Board has no jurisdiction over deed restrictions, Ms. Harris argues that the violations of the deed restrictions that would be created by the Project amount to an undue adverse effect on orderly development. Ms. Harris requests that the Board exercise its “legal authority over the manner in which petitioners conduct business” and consider “the violation of community interests” reflected in the Project’s violation of the deed restrictions.³⁶

34. Chelsea PFD Response at 2, citing *Petition of Georgia Mountain Community Wind*, Docket 7508, Order of 6/11/10, at 53 (quoting *City of South Burlington v. Vermont Electric Power Company, Inc.*, 133 Vt. 438, 447 (1975)). Chelsea misapplies this citation by applying it to the language of the Town Plan rather than to municipal zoning regulations. In Docket 7508, the Board concluded that because zoning regulations are subject to variances that may result in different zoning standards, “it is more appropriate to rely on the town plan as the primary source of clear written community standards.” Docket 7508, Order of 6/11/10 at 53. Here, the Board is following the legislative direction of Section 248(b)(1) and its own precedent in Docket 7508 by giving due consideration to the Town Plan without relying upon the Town’s zoning regulations, which were attached to the Chelsea PFD Response and never introduced into evidence.

35. Chelsea PFD Response at 2.

36. Harris PFD Comments at 3.

Ms. Harris also argues that the connection of a public and private road “changes the way the region may develop in the future.”³⁷

We have visited the sites of both Willow Road and Apple Hill Road. We have also reviewed the Chelsea site plans and do not agree with Ms. Harris that the Project would connect the two roads. While Chelsea contemplates using Willow Road south of the Project site for construction and Apple Hill Road north of the Project site for operations and maintenance, there is no evidence that the two roads would be linked to allow commercial traffic from Willow Road onto Apple Hill Road. On the contrary, the construction access provided to the Chelsea site from Willow Road would be closed off with a fence after construction, and the improvements to Apple Hill Road would not extend south so as to link up with the fenced-off former construction access to Willow Road. Therefore, we are not persuaded that the Project would interfere with orderly development by creating a through road.

Ms. Harris also argues that Chelsea “is proposing to utilize shared road and utility infrastructure to create one 4 MW solar project, in violation of the rules for standard offer projects.”³⁸ This argument is supported neither by the evidence nor by any legal argument, and we are not persuaded by it.

2. Aesthetics

In her comments on the PFD, Ms. Harris also raises a new argument about aesthetics. Specifically, Ms. Harris argues that the aesthetic impact of the Project would be undue because it would violate clear, written community standards found in the Town Plan and thus fails the first prong of the second part of the Quechee test, which states:

The next step in the two-part test, once a conclusion as to the adverse effect of the project has been reached, is to determine whether the adverse effect of the project is “undue.” The adverse effect is considered undue when a positive finding is reached regarding any one of the following factors:

37. *Id.*

38. *Id.* We note that the rules for standard-offer projects that Ms. Harris cites do not specifically apply to a Section 248 review but instead provide guidance to the process of making an application for a standard-offer contract.

1. Does the project violate a clear, written community standard intended to preserve the aesthetics or scenic beauty of the area?³⁹

Ms. Harris argues that limitations on development in the Rural Conservation District constitute a clear, written community standard that would be violated by the Project. We agree with Ms. Harris and therefore do not accept the Hearing Officer's recommendation on this point.

In order for a provision to be considered a clear, written community standard, it must be "intended to preserve the aesthetics or scenic beauty of the area" where the proposed project would be located and must apply to specific resources in the proposed project area.⁴⁰ A clear, written community standard must be more than simply "general in nature" and do more than seek "to promote good stewardship of scenic resources without identifying specific actionable standards."⁴¹

The Town Plan language for the Rural Conservation District creates four specific requirements: (1) only limited residential development is permitted,⁴² (2) no development may be sited in prominently visible locations on hillsides or ridgelines,⁴³ (3) any development must utilize earth-tone colors and non-reflective materials on exterior surfaces of all structures,⁴⁴ and (4) any development must minimize the clearing of natural vegetation.⁴⁵

39. *Amended Petition of UPC Vermont Wind*, Docket 7156, Order of 8/8/07 at 64–65.

40. *In re Halnon*, NM-25, Order of 3/15/01 at 22.

41. *Joint Petition of Green Mountain Power Corporation, et al*, Docket 7628, Order of 5/31/11 at 83.

42. Exh. CS-MK-3 at 16.

43. Exh. CS-MK-3 at 26.

44. *Id.*

45. *Id.*

The Project violates three⁴⁶ of these four specific requirements in the Town Plan for development in the Rural Conservation District. First, Chelsea Solar is not proposing a limited residential development. Second, while Chelsea has developed an extensive visual screening plan, the Project would remain visible on a hillside above the Vermont Welcome Center. And third, the Project calls for clear-cutting 10.6 acres of a densely forested and undeveloped 27-acre parcel. These proposed actions would violate this clear, written community standard in the Town Plan, and we therefore conclude that the Project fails the Quechee test.

Chelsea argues that the Town Plan language is merely a “recommendation.”⁴⁷ We disagree.

The Town Plan states that “agriculture, forestry, very low density single-family residential development, and certain limited uses that are suitable in rural areas are permitted.”⁴⁸ The Town Plan also makes the following design standard applicable to any new development in Rural Conservation Districts:

Specific design standards shall apply to new development in the Rural Conservation Districts in recognition of the existence of a concentration of agricultural and forest lands and to protect the extraordinary scenic resources such lands and uses provide. Any use in the Rural Conservation District, including single family dwellings, shall require approval under those regulatory guidelines. Development in this area cannot be sited in prominently visible locations on hillsides or ridgelines, shall utilize earth tone colors and non-reflective materials on exterior surfaces of all structures, and must minimize clearing of natural vegetation.⁴⁹ (*emphasis added*)

46. There is evidence in the record to support the conclusion that the Project “shall utilize earth tone colors and non-reflective materials on exterior surfaces of all structures.” Specifically, the First DPS MOU requires at ¶ 5.a that the central equipment skid “be of a dark grey color,” and the Second DPS MOU includes language at ¶ 3 “to encourage GMP to install interconnection facilities and equipment that are dark grey in color.” Also, Chelsea’s Aesthetics Assessment Report states that at a distance the Project would appear “as a dark mass, similar in tonality to woodlands.” Exhibit CS-MK-2 at 12.

47. Chelsea PFD Response at 6.

48. Exh. CS-MK-3 at 26.

49. Exh. CS-MK-3 at 26.

In this case, we find that the Town Plan language is specific in nature, is specifically applicable to the Project site, and seeks to conserve scenic resources by identifying specific actionable requirements and thus constitutes a clear, written community standard.⁵⁰

Chelsea further characterizes the Town Plan provisions describing the Rural Conservation District as “vague, amorphous” and “nebulous.”⁵¹ Chelsea maintains that these provisions are actually “zoning bylaws.”⁵² Chelsea argues that it would be “frivolous” to rely on the standards in the Town Plan for the Rural Conservation District because they “compel a specified outcome contrary to the intent of the Legislature in providing an exemption from zoning by-laws for Projects reviewed under Section 248, as well as to established Vermont law.”⁵³ We find this case distinguishable from our decision in *Cold River*, where *de facto* zoning bylaws were at issue.

In *Cold River* we found that Town of Rutland’s solar siting standards (the “Standards”), newly crafted in support of the Rutland Town Plan, were a *de facto* zoning bylaw and could not be relied upon as a clear, written community standard “for purposes of aesthetics review under § 248 because the Standards fail to identify this particular parcel as a scenic resource worthy of protection.”⁵⁴ Rather than being established as a site-specific set-aside for the purposes of aesthetics and conservation, as is the case here, the Standards in *Cold River* were a town-wide setback rule for solar projects. The Board concluded that:

In the instant case, recognizing the setback requirements in the Standards as a clear, written community standard would be tantamount to taking what is in substance a zoning bylaw, and by simply calling it something else, facilitating the circumvention of Section 248’s zoning bylaw exemption. In turn, this would

50. It is appropriate for us to rely on the Town Plan as the primary source of clear, written community standards. See Docket 7628, Order of 5/31/11 at 86-87.

51. Chelsea PFD Responses at 7-8.

52. *Id.* at 6-7.

53. *Id.* at 7 citing *Petition of Rutland Renewable Energy, LLC re Reconsideration of the Cold River Project* (“*Cold River*”), Docket 8188, Order of 5/6/15 at 5.

54. Docket 8188, Order of 3/11/15 at 85-86.

amount to effectively condoning a mechanism that would frustrate the legislated policy behind exempting Section 248 projects from local zoning in the first instance.⁵⁵

The factual circumstances are different here. The standards for the Rural Conservation District were established to conserve the rural character of a particular area of Bennington, not to create town-wide setbacks for solar projects. The Rural Conservation District provisions in the Bennington Town Plan are not *de facto* zoning bylaws as argued by Chelsea.⁵⁶ Further, the Rural Conservation District language identifies specific actionable requirements.⁵⁷ The Town Plan's language limiting development in the Rural Conservation District represents a clear, written community standard appropriately considered in a review under Section 248(b)(5) and the first prong of the second part of the Quechee test.

We appreciate the efforts of Chelsea and the Department to propose an unprecedented and costly vegetative screening plan to mitigate the visual impacts of the Project. However, our conclusion that the Project would violate a clear, written community standard intended to preserve the aesthetics or scenic beauty of the Project site and its surrounding area concludes our analysis of the aesthetic impacts of the Project using the Quechee test.⁵⁸

Ms. Harris also asserts that the Town Plan "visual gateway" language is a clear, written community standard.⁵⁹ We disagree.

The "visual gateway" language is not an example of a clear, written community standard. It is articulated in an enclosure to the Town Plan, the "Scenic Resource Inventory of Bennington, Vermont." It designates the US Route 7/VT Route 279 interchange, above which the Project site

55. *Id.* at 48.

56. Without citing any support for the premise that the design standards are a zoning regulation, Chelsea nonetheless purports to draw a distinction between those regulations and the design standards in the Town Plan: "the Bennington zoning rules (a copy of which is attached hereto as Exhibit A), fail to mention anything that could be remotely considered a 'standard' with respect to the design factors discussed in the Town Plan." *Id.*

57. *See* Docket 7508, Order of 6/11/10, at 52.

58. Docket 7156, Order of 8/8/07 at 64–65.

59. Harris PFD Comments at 4.

is located, and US Route 7, next to the Project site heading south into Bennington, as “visual gateways” to Bennington. As such, the Town Plan characterizes these locations as “important scenic resource[s]” requiring “special attention” that can “be improved by effective land use planning and integration of site features such as landscaping.”⁶⁰

The “visual gateway” language, while specific to the Project site, simply makes the areas adjacent to the Project site “important” and “special,” but does not set a specific standard that the Project would violate.

Finally, Chelsea asks that the Board give “significant weight” to the greenhouse gas benefits of the Project in reaching our determination on aesthetics.⁶¹ Consistent with our precedent on aesthetic impacts of projects subject to Section 248 review, we have given significant consideration to the Project’s potential greenhouse gas benefits. However, in light of the development standards in the Town Plan applicable to the Rural Conservation District, in particular the requirement that vegetative clearing be kept to a minimum, we cannot conclude that the societal benefits cited by Chelsea are so significant as to render acceptable the otherwise undue adverse aesthetics impact caused by the clear-cutting of 10.6 acres of existing mature forest to accommodate the Project.

Issues Raised by Chelsea

Finding 12.

Chelsea requests that the Board delete and replace proposed finding 12, which currently reads:

12. A concrete pad would be constructed to support the pad-mounted interconnection equipment – a metering cabinet and a recloser cabinet – required by GMP. This pad would be approximately 13 feet in length by 10 feet in width with a burial depth of approximately 18 inches. The pad would support the equipment cabinets at a height of approximately 6 inches above grade. The

60. Exh. CS-MK-3 at 20.

61. Chelsea PFD Response at 10, citing Docket 6792, Order of 7/17/03 at 28.